No. 7771

/3

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a Corporation,

Appellant.

vs.

SPOKANE, PORTLAND and SEATTLE RAILWAY COMPANY, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Oregon.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

No. 7771

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a Corporation,

Appellant.

vs.

SPOKANE, PORTLAND and SEATTLE RAILWAY COMPANY, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the District of Oregon.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX—(Continued)

INDEX—(Continued)

INDEX—(Continued)

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD.

JAMES G. WILSON and JOHN R. REILLY,
Platt Building,
Portland, Oregon,
For the Appellant.

CAREY, HART, SPENCER & McCULLOCH,
Yeon Building,
Portland, Oregon,
For the Appellee.

In the District Court of the United States for the District of Oregon

July Term, 1933.

BE IT REMEMBERED, That on the 20th day of September 1933, there was duly filed in the District Court of the United States for the District of Oregon, a COMPLAINT, in words and figures as follows, to wit: [4]*

In the District Court of the United States for the District of Oregon

No. L-12110

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Plaintiff

v.

NORTHERN PACIFIC TERMINAL COMPANY, a corporation,

Defendant.

COMPLAINT

Now comes plaintiff and for cause of action herein alleges:

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington. Defendant is a corporation organized and existing under the laws of the State of Oregon.

---

* Page numbering appearing at the foot of page of original certified Transcript of Record.

II.

The jurisdiction of this court as a federal court herein is based upon diversity of citizenship. The amount involved, exclusive of interest and costs, exceeds the sum of $3,000.00.

III.

Plaintiff is a common carrier operating a railroad between Spokane, Washington, and Portland, Oregon, and elsewhere, subject to the provisions of an Act to Regulate Commerce, approved February 4, 1887, as amended, being the Interstate Commerce Act, United States Code, Title 49, [5] Chapter 1. Defendant is engaged as a common carrier in the operation of a terminal railroad within the City of Portland, Oregon, and its operations are also subject to said statute.

IV.

Between April 1, 1929, and January 4, 1930, plaintiff received and accepted from defendant as consignor, at plaintiff's station of Willbridge in the City of Portland, Oregon, 286 carload shipments of fuel oil for transportation to Guilds Lake Yard, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake Yard in accordance with bills of lading issued to cover said shipments, and at Guilds Lake Yard were delivered to defendant.

V.

Theretofore plaintiff had filed with the Interstate Commerce Commission and with the Public

Service Commission of Oregon and had published tariffs which stated a rate of $8.55 per car for the transportation of fuel oil from Willbridge to Guilds Lake Yard, and during the entire period of said shipments the duly and regularly filed and published charge for such transportation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $8.55 per car; and the total transportation charge for said 286 cars of fuel oil was and is the sum of $2,445.30.

VI.

Between the 8th day of January, 1930, and the 4th day of January, 1932, plaintiff received and accepted from defendant as consignor, at plaintiff's station of Linnton [6] in the City of Portland, Oregon, 664 carload shipments of fuel oil for transportation to Guilds Lake Yard, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake Yard in accordance with bills of lading issued to cover said shipments, and at Guilds Lake Yard were delivered to defendant.

VII.

Theretofore plaintiff had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $8.54 per car for the transportation of fuel oil from Linnton to Guilds Lake Yard, and during the entire period of said shipments the duly and regularly filed and pub-

lished charge for such transportation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $8.54 per car; and the total transportation charge for said 664 cars of fuel oil was and is the sum of $5,670.56.

VIII.

Between the 2nd day of January, 1932 and the 28th day of March, 1932, plaintiff received and accepted from defendant as consignor, at plaintiff's station of Linnton in the City of Portland, Oregon, 87 carload shipments of fuel oil for transportation to Guilds Lake Yard, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake Yard in accordance with bills of lading issued to cover said shipments, and at Guilds Lake Yard were delivered to defendant, [7]

IX.

Theretofore plaintiff had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $9.40 per car for the transportation of fuel oil from Linnton to Guilds Lake Yard, and during the entire period of said shipments the duly and regularly filed and published charge for such transportation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $9.40 per car; and the total transportation charge for said 87 cars of fuel oil was and is the sum of $817.80.

X.

The total charges which accrued and became due to plaintiff from defendant for said transportation of fuel oil from Willbridge to Guilds Lake Yard and from Linnton to Guilds Lake Yard, was and is the sum of $8,933.66.

XI.

Through error and in the mistaken belief that defendant was a participating carrier in the transportation of said shipments of fuel oil under the applicable tariffs, plaintiff heretofore allowed and paid to defendant as a division under said tariffs, one-half of the amount due and collectible for said transportation. Defendant was not a participating carrier and is not entitled under the applicable tariffs to a share in or a division of the tariff charge covering said transportation service; and because of said mistaken allowance and payment plaintiff has not charged or collected from defendant the full amount specified by said applicable tariffs for the transportation service rendered, [8] and by reason thereof defendant is indebted to plaintiff in the amount of the allowance and payment so mistakenly made, being the total sum of $4,466.83.

WHEREFORE, Plaintiff demands judgment against defendant for the sum of $4,466.83, and for its costs and disbursements herein.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff

State of Oregon
County of Multnomah—ss.

I, A. J. WITCHEL, being first duly sworn, depose and say: That I am Secretary of SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, the plaintiff in the above entitled cause; that I have read the foregoing complaint and know the contents thereof, and the same is true as I verily believe.

A. J. WITCHEL

Subscribed and sworn to before me this 19th day of September, 1933.

[Notarial Seal] J. R. OSBORN
Notary Public for Oregon

My Commission expires: March 24, 1936.

[Endorsed]: Filed September 20, 1933. [9]

AND AFTERWARDS, to wit, on the 30th day of September, 1933, there was duly FILED in said Court, an ANSWER, in words and figures as follows, to wit: [10]

[Title of Court and Cause.]

ANSWER

Comes now the defendant and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits Paragraph I, except that defendant alleges that the corporate name of the defendant is

The Northern Pacific Terminal Company of Oregon.

II.

Admits Paragraph II.

III.

Admits Paragraph III.

IV.

Defendant denies each and every allegation and the whole of Paragraph IV of plaintiff's complaint, except that defendant admits that from April 1, 1929, to January 4, 1930, the Standard Oil Company of California, as consignor, delivered to plaintiff at its station at Willbridge, in the City of Portland, 286 carload shipments of fuel oil for transportation and delivery to the fuel oil spur of the defendant at defend- [11] ant's Guilds Lake Terminal, also within the City of Portland, and that said shipments of fuel oil were transported from Willbridge Station by the plaintiff and delivered to the defendant on the transfer track for interchange of business between the plaintiff and the defendant in Guilds Lake Yard for further transportation by the defendant to the fuel oil spur of the defendant in Guilds Lake Terminal, and were so transported. That at all times the said fuel oil was the property of the Standard Oil Company of California and did not become the property of the defendant until delivery at its fuel oil spur in Guilds Lake Terminal. Except as so admitted defendant denies each

and every allegation in said Paragraph IV of plaintiff's complaint.

V.

Defendant admits each and every allegation and the whole of Paragraph V of plaintiff's complaint, except that defendant alleges that the said rate of $8.55 per car applied on transportation of fuel oil from Willbridge to all tracks in Guilds Lake terminal, including the fuel oil spur at the roundhouse in Guilds Lake terminal and that the total charges assessable for such transportation of said cars was $2445.30 for the transportation thereof from point of receipt by the plaintiff at Willbridge to point of delivery at the fuel oil spur in the Guilds Lake terminal of the defendant.

VI.

Defendant denies each and every allegation and the whole of said Paragraph VI of plaintiff's complaint, but admits that between January 8, 1930, and the 4th day of January, 1932, the Richfield Oil Company of California, as consignor, delivered to the plaintiff at plaintiff's station in Linnton, in the City [12] of Portland, 656 carload shipments of fuel oil for transportation and delivery at the fuel oil spur of the defendant in Guilds Lake terminal, also within the limits of the City of Portland, and except further that the defendant admits that the carload shipments of fuel oil were transported by the plaintiff to the transfer track designated for the transfer of carload shipments between the plain-

tiff and the defendan*d* in Guilds Lake yard for further transportation by the defendant from said transfer track to point of final delivery at the oil spur in Guilds Lake terminal of defendant. Except as so admitted defendant denies each and every allegation of Paragraph VI of said complaint.

VII.

Defendant admits each and every allegation and the whole of Paragraph VII of plaintiff's complaint, except that defendant alleges that the said rate was $8.55 per car and that the said rate applied on shipments of fuel oil in carload lots from the station of Linnton to all tracks within the Guilds Lake terminal of the defendant, including the fuel oil spur at the roundhouse of defendant in said Guilds Lake terminal, and except further that *plaintiff* denies that said total shipments were 664 cars or that the total transportation charge therefor was $5670.50, but admits that the total carload shipments were 656 cars, and that the total transportation charges due for said transportation from Linnton to the fuel oil spur at the roundhouse of defendant in the Guilds Lake terminal was the sum of $5608.80. [13]

VIII.

Defendant denies each and every allegation and the whole of Paragraph VIII of plaintiff's complaint, except that defendant admits that between the 2nd day of January, 1932 and the 28th day of March, 1932 the Richfield Oil Company of Cali-

fornia, as consignor, delivered to the plaintiff for transportation from plaintiff's station at Linnton, in the City of Portland, Oregon, 88 carload shipments of fuel oil for transportation to the fuel oil spur of the defendant at the roundhouse in Guilds Lake terminal, also within the City of Portland, and that the said shipments were delivered to the defendant at the transfer track designated for transfer shipments between the plaintiff and defendant at Guilds Lake Yard for further transportation from said transfer track to point of final delivery at the said fuel oil spur and that said shipments were so transported over the lines of the plaintiff and the defendant from Linnton to the said fuel oil spur. Except as so admitted, defendant denies each and every allegation in Paragraph VIII of plaintiff's complaint.

IX.

Defendant admits each and every allegation of Paragraph IX of plaintiff's complaint, except that defendant denies that there were only 87 cars of fuel oil, or that the total transportation charge was only $817.86, but admits that there were 88 cars of fuel oil and that the total transportation charge from Linnton to the said fuel oil spur was $827.20, and except further the plaintiff alleges that the said rate of $9.40 applied from Linnton to deliveries on all tracks within the [14] Guilds Lake terminal, including the said fuel oil spur at the roundhouse in said terminal for which said fuel oil was destined.

X.

Defendant denies each and every allegation and the whole of Paragraph X of plaintiff's complaint, but admits that the total charges on all such shipments from Willbridge to the fuel oil spur in Guilds Lake terminal, and from Linnton to the said fuel oil spur in the Guilds Lake terminal during said period was and is the sum of $8881.30.

XI.

Defendant denies each and every allegation and the whole of Paragraph XI of plaintiff's complaint.

For a FIRST further and separate answer and defense to plaintiff's complaint, defendant alleges:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Washington, and is engaged in the transportation of freight and passengers both in interstate and intrastate commerce and has filed tariffs covering transportation of such freight and passengers both with the Interstate Commerce Commission and with the Public Utilities Commissioner of the State of Oregon, and its predecessor, Public Service Commission of Oregon, establishing such rates and charges, and is subject both to the Act of Congress known as the Interstate Commerce law and the Public Service Laws of the State of Oregon. [15]

II.

Defendant is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and is engaged in the transportation of freight and passengers over its line and has filed with the Interstate Commerce Commission and with the Public Utilities Commissioner of the State of Oregon, and his predecessor the Public Service Commission of Oregon, tariffs stating such charges and is subject to both the Act of Congress known as the Interstate Commerce law and the laws of the State of Oregon governing public service corporations.

III.

That heretofore and prior to the 1st day of February, 1923, the plaintiff and defendant in conjunction with the Northern Pacific Railway Company, the Oregon Electric Railway Company, Oregon-Washington Railroad & Navigation Company, Portland Electric Power Company, Southern Pacific Company, and United Railways Company established and filed tariffs with the Interstate Commerce Commission and the Public Service Commission of Oregon stating rates for what was known as zone switching between all points on the lines of said companies within the switching limits of the City of Portland, Oregon, and thereafter at all times since has had in force and had schedules on file with both the Interstate Commerce Commission and the Public Service Commission of Oregon, and its successor the Public Utilities Commissioner

of the State of Oregon governing the charges to be applied on shipments between points on any of said lines and points on other of such lines. That in and by said tariffs so filed and in force it was provided that rates named in said [16] tariffs should apply only for intra terminal, inter terminal and intra plant service, and must not be used when the switching is performed in connection with the line haul. That in said tariffs inter terminal switching was defined as a switching movement from a track on one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district. That in and by said tariffs it was provided that zone 5 should embrace all tracks on the west side of the Willamette River north of Nicolai Street to the northern boundary of Linnton. That the rate established and in effect by said tariffs at all times from and after February 1, 1923, up to and including the date of the last shipment referred to in plaintiff's complaint should be from one point within zone 5 to another point within zone 5, the sum of $8.55 per car, except that from and after January 4, 1932 up until the present time the rate per car for such switching from one point in Zone 5 to another point in zone 5 is $9.40 per car. That during a part of said time an increased rate was in effect for cars over 42 feet in length, but defendant alleges that all of said cars involved in the present controversy were under 42 feet in length, and that the said increased rate for extra length cars had

no application to any of the shipments involved in this controversy.

IV.

Defendant alleges that the tracks on the line of the plaintiff at both Linton and Willbridge, at which any of the shipments involved in this controversy originated, were within zone 5, as defined by said tariffs on file, and [17] that all tracks, including both the transfer track at Guilds Lake yard and the fuel oil spur at the roundhouse in the Guilds Lake terminal herein referred to were in Zone 5 as defined by said tariffs on file, and that the entire haul of said shipments from their originating point either at Linnton or Willbridge, through the transfer track at Guilds Lake yard to the point of final destination at the fuel oil spur at the roundhouse in the Guilds Lake terminal was within zone 5 as defined by said tariffs. That on none of said shipments was any line haul involved.

That by agreement of the parties establishing the division of rates for any such haul it was provided that when only two lines participated in the haul the charge for such haul should be divided equally between the carriers participating in the haul.

That the plaintiff has no interest in or any right to operate over or make deliveries of shipments to any point in the Guilds Lake terminal, and that all deliveries of shipments to points in the Guilds Lake terminal are made by the defendant, except that commencing on September 12, 1922, the plaintiff and defendant agreed that on all shipments moved

jointly from Linnton and Willbridge over the lines of the plaintiff and the Terminal Company for further transportation to points on the line of the defendant, the Northern Pacific Railway Company, Southern Pacific Company, or Oregon-Washington Railroad & Navigation Company should be interchanged on the transfer track designated for that purpose in the Guilds Lake yard, and not otherwise, and that later and effective Sunday, January 24, 1926, the plaintiff and defendant agreed that on interchange of all traffic from [18] the plaintiff to defendant for delivery by it or for transfer to the Northern Pacific Railway Company, Southern Pacific Company and Oregon-Washington Railroad & Navigation Company the interchange of all such traffic should be had on the transfer track designated for that purpose in the Guilds Lake yard. Except for the purpose of transfer for further shipment the plaintiff has at no time had the right to come upon any track at the Guilds Lake Yard and has at no time had the right to make final delivery of any shipment in the said Guilds Lake Yard or the Guilds Lake terminal.

That there are no unloading or delivery facilities for oil or any other commodity on the transfer track so designated for transfer of shipments at the Guilds Lake Yard between the plaintiff and the defendant and that none of the shipments so delivered by the plaintiff to the defendant were when placed by the defendant upon the transfer track, at point of final destination, and all of the shipments refer-

red to in plaintiff's complaint and referred to hereinafter in the further and separate answers of the defendant, at final destination of said shipments, but were placed on said track by the plaintiff for transfer to the defendant for further shipment to final destination of such shipments, and not otherwise. That the plaintiff has at all times from and after the 1st day of February, 1923, known that when said shipments were placed on said transfer track by it at the Guilds Lake Yard that said shipments were not at their final destination and were for further transportation by the defendant. That in each and all of the shipments referred to when the same were placed upon the transfer track at Guilds Lake Yard the [19] defendant has received the same for further transportation, and not otherwise, and has transported the same from the said transfer track to the fuel oil spur of the defendant at the roundhouse in the Guilds Lake terminal. That said cars were delivered on said transfer track at all times by the plaintiff, together with numerous other cars, were not spotted by any unloading point by the plaintiff, the defendant was required to break up the transfer cars so set out by the plaintiff, segregate the same, transport the fuel oil cars from said transfer track to the oil spur at the roundhouse of defendant in Guilds Lake terminal, and that the same involved service by the defendant of segregating said cars from other cars and transporting them a distance of from three-quarters to one mile from said transfer point to the point of final destination.

That with reference to all shipments from the Standard Oil Company to the defendant involving all of said shipments up to and including the 4th day of January, 1930, the defendant had no interest in the commodity shipped until the same was delivered on the fuel oil spur in the Guilds Lake terminal as the contract to purchase said oil between the Terminal Company and the Standard Oil Company provided that said shipments be sold to the Terminal Company f. o. b. fuel oil spur in the Guilds Lake terminal. That with reference to the shipment from the Richfield Oil Company the purchase of the oil by the defendant was made f. o. b. the Richfield Oil Company spur at Linnton.

V.

That in each and all of said shipments the defendant was a participating carrier on the shipments from point [20] of origin of said shipments to point of destination to-wit: Oil spur at the roundhouse of the defendant in the Guilds Lake Terminal, and did in fact participate in the transportation service on each and all of said shipments and the defendant was entitled to one-half the revenue accruing on said shipments from point of origin to point of destination.

For a SECOND further and separate answer and defense to plaintiff's complaint, and by way of counterclaim, defendant alleges:

I.

Defendant incorporates herein, refers to and repeats as if set out at large Paragraph I to V, inclusive, of the First further and separate answer and defense to plaintiff's complaint.

II.

That there was shipped over the line of the plaintiff and defendant from either Linnton or Willbridge to the defendant for delivery at the fuel oil spur at the round house in the Guilds Lake terminal from February 1, 1923, to and inclusive of the 6th day of January, 1930, a total of 1,309 cars of fuel oil on which the total charges for transportation was the sum of $19,682.10, of which the defendant has received only $1222.65. That there is due and owing on account of such shipments from the plaintiff to the defendant the sum of $8,618.40. That between the 6th day of January, 1930, and the date of filing this answer, between said points a total of 744 cars was transported, on which the total transportation charges earned was the sum of $6,436.01, on which there was due and owing from the plaintiff to [21] the defendant the sum of $3218.00, no part of which has been paid by the plaintiff to the defendant, except the sum of $3215.91, leaving a balance due the defendant on account of such shipments from the plaintiff of the sum of $2.09.

WHEREFORE, having fully answered plaintiff's complaint defendant prays that plaintiff take

nothing by its complaint, and that the defendant have and recover of and from the plaintiff the sum of $8,620.49, and its costs and disbursements, incurred herein.

JAMES G. WILSON
JOHN F. REILLY
Attorneys for Defendant [22]

State of Oregon
County of Multnomah—ss:

I, E. L. KING, being first duly sworn, depose and say: that I am Vice President of The Northern Pacific Terminal Company of Oregon, defendant within named; that I have read the foregoing Answer, know the facts therein stated, and that the same is true as I verily believe.

E. L. KING

Subscribed and sworn to before me this 30th day of September, 1933.

[Notarial Seal] JAMES G. WILSON
Notary Public for Oregon

My Commission expires: Oct. 5, 1936.

Due service of the within Answer is admitted this 30th day of Sept. 1933.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff

[Endorsed]: Filed September 30, 1933. [23]

AND AFTERWARDS, to wit, on the 21st day of December, 1933, there was duly FILED in said Court, a REPLY, in words and figures as follows, to wit: [24]

[Title of Court and Cause.]

REPLY

Now comes plaintiff and replies to the answer herein as follows:

I.

Plaintiff denies the allegations of paragraph IV of the answer to the effect that the common carrier transportation service undertaken with respect to the shipments of fuel oil therein described and to which the published tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs.

II.

Plaintiff denies the allegations of paragraph V of the answer to the effect that the published tariff rate covering switching movements of fuel oil from Willbridge to Guilds [25] Lake terminal, extended or applied to the movement of such fuel oil by defendant between the point of delivery by plaintiff at

Guilds Lake and the fuel oil spur, or other place of use, upon defendant's property.

III.

Plaintiff denies the allegations of paragraph VI of the answer to the effect that the common carrier transportation service undertaken with respect to the shipments of fuel oil therein described and to which the published tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs.

IV.

Plaintiff admits that its complaint was incorrect in the statement of paragraph VI thereof to the effect that 664 carload shipments of fuel oil were received and transported from Linnton to Guilds Lake, and that (as stated in paragraph VII of the complaint) the total tariff charges therefor were the sum of $5,670.56. The correct number of shipments was 657 and the total tariff charges therefor were the sum of $5,617.35.

V.

Plaintiff denies the allegations of paragraphs VI and VII of the answer to the effect that the common carrier transportation service undertaken with

respect to the shipments of fuel oil therein described and to which the published [26] tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs, and denies that the published tariff rate covering switching movements of fuel oil from Willbridge to Guilds Lake terminal, extended or applied to the movement of such fuel oil by defendant between the point of delivery by plaintiff at Guilds Lake and the fuel oil spur, or other place of use, upon defendant's property.

VI.

Plaintiff denies the allegations of paragraph VIII of the answer to the effect that the common carrier transportation service undertaken with respect to the shipments of fuel oil therein described and to which the published tariff charge was applicable, extended to the movement of said shipments between the point of delivery to defendant at Guilds Lake terminal and the fuel oil spur, or other place of use, of the defendant upon its property, and denies that said shipments were delivered to defendant for further common carrier transportation under said tariffs.

VII.

Plaintiff denies the allegations of paragraph IX of the answer to the effect that the published tariff rate covering switching movements of fuel oil from Willbridge to Guilds Lake terminal, extended or applied to the movement of such fuel oil by defendant between the point of delivery by plain- [27] tiff at Guilds Lake and the fuel oil spur, or other place of use, upon defendant's property.

VIII.

Plaintiff admits the allegations of paragraphs I, II and III of the further and separate answer of defendant.

IX.

Plaintiff admits that the tracks on its line at Linnton and Willbridge are within Zone 5, as defined by the duly published and filed tariffs, but denies that the fuel oil spur, or other place of storage or use for fuel oil on the defendant's property in its Guilds Lake terminal, are points of delivery to which the switching rates stated in said tariffs are applicable.

Plaintiff admits that as to all common carrier transportation service under such tariffs in which two lines participated, the revenue therefor was divided equally pursuant to agreement between the parties.

Plaintiff further admits that it has no interest in, or any right to operate over, tracks within the

terminal of defendant at Guilds Lake, and admits that in making deliveries of shipments for further common carrier transportation to defendant or other carriers, an interchange track in the Guilds Lake yard has been used.

Plaintiff further admits that there are no unloading facilities for oil at the transfer track in the Guilds Lake yard.

Except as so admitted, plaintiff denies each and every allegation of paragraph IV of defendant's further and separate [28] answer.

X.

Plaintiff denies that defendant was a participating common carrier under said applicable tariffs in any of the shipments referred to in paragraph V of the further and separate answer, or in any of the shipments described in the complaint.

XI.

For its reply to defendant's second further and separate answer and counterclaim herein, plaintiff adopts and repeats the allegations of paragraphs VIII to X, inclusive, of this reply relative to defendant's first further and separate answer.

XII.

Further replying plaintiff admits that shipments of fuel oil were made from Linnton or Willbridge to defendant at its Guilds Lake terminal from February 1, 1923, to January 6, 1930, and from January 6, 1930, to the time of the filing of

the answer herein, except that plaintiff denies that such shipments were accepted or received for transportation to the fuel oil spur at defendant's roundhouse, or to any other place of use upon defendant's property. Plaintiff is not advised as to the total shipments so made or as to the total amount of charges assessed therefor under the applicable tariffs, but plaintiff denies that defendant was a participating carrier in the transportation of said shipments, and denies that defendant is entitled to share in the charges assessed and collected for such transportation.

XIII.

Further replying to said second further and separate [29] answer and counterclaim, plaintiff alleges that under the terms of an agreement to which plaintiff and all of the defendant's stockholders are parties, the time limit for making claims for accounting adjustments is 36 months, and that said agreement by custom and practice was adopted and made effective with respect to adjustments of differences with defendant; and plaintiff alleges, with respect to all shipments which were transported and accounted for more than 36 months prior to the date of the filing of defendant's answer, that defendant's counterclaim is barred by lapse of time.

XIV.

Further replying to defendant's second further and separate answer and counterclaim, plaintiff alleges that as to all of the shipments therein de-

scribed which were transported and for which charges were assessed and collected prior to September 30, 1927, that defendant's counterclaim is barred because no action thereon was commenced within the time limited by the laws of the State of Oregon.

WHEREFORE, plaintiff demands judgment as prayed for in its complaint herein.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff [30]

State of Oregon
County of Multnomah—ss.

I, A. J. WITCHEL, being first duly sworn, depose and say: that I am Secretary of SPOKANE PORTLAND AND SEATTLE RAILWAY COMPANY, the plaintiff in the above entitled cause; that I have read the foregoing reply and know the contents thereof, and the same is true as I verily believe.

A. J. WITCHEL

Subscribed and sworn to before me this 26th day of December, 1933.

[Notarial Seal] J. R. OSBORN,
Notary Public for Oregon.

My Commission expires: March 24, 1936.

United States of America,
District of Oregon
County of Multnomah.—ss.

Due service of the Within Reply is hereby accepted at Portland, Oregon, this 20th day of Decem-

ber, 1933, by receiving a copy thereof, duly certified to as such by C. A. Hart, of attorneys for plaintiff.

JAMES G. WILSON,
Attorney for Defendant.

[Endorsed]: Filed December 21, 1933. [31]

AND AFTERWARDS, to wit, on the 14th day of March, 1934, there was duly FILED in said Court, a STIPULATION WAIVING TRIAL BY JURY, in words and figures as follows, to wit: [32]

[Title of Court and Cause.]

STIPULATION FOR WAIVER OF JURY

The parties hereto do hereby waive the right to a jury upon the trial of this action and stipulate that the action may be tried to the court without a jury.

Dated March 14, 1934.

CAREY, HART, SPENCER & McCULLOCH
Attorneys for Plaintiff

WILSON & REILLY
Attorneys for Defendant

[Endorsed]: Filed March 14, 1934. [33]

AND AFTERWARDS, to wit, on the 30th day of October, 1934 there was duly FILED in said

Court, and entered of record, FINDINGS OF FACT AND CONCLUSIONS OF LAW, in words and figures as follows, to wit: [34]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action was duly tried to the court without a jury, the parties having stipulated in writing to waive a jury. The plaintiff was represented by Messrs. Carey, Hart, Spencer & McCulloch and Charles A. Hart, Esquire, and defendant was represented by Messrs. Wilson & Reilly and James G. Wilson, Esquire. The court having heard and considered the evidence and the arguments made for the respective parties, now makes the following

FINDINGS OF FACT

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington. Defendant is a corporation organized and existing under the laws of the State of Oregon. The amount involved in the cause, exclusive of interest and costs, exceeds the sum of $3,000.00.

II.

Plaintiff is a common carrier operating a railroad [35] between Spokane, Washington, and Portland, Oregon, and elsewhere, subject to the provisions of an Act to Regulate Commerce, approved February 4, 1887, as amended, being the Interstate

Commerce Act, United States Code, Title 49, Chapter 1. Defendant is engaged as a common carrier in the operation of a terminal railroad within the City of Portland, Oregon, and its operations are also subject to said statute.

III.

Between April 1, 1929, and January 4, 1930, there were delivered to plaintiff as a common carrier at Willbridge in the City of Portland, 286 carload shipments of fuel oil consigned to defendant at Guild's Lake, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guild's Lake in accordance with bills of lading issued to cover said shipments, and at Guild's Lake were delivered to defendant.

IV.

Theretofore plaintiff and defendant had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $8.55 per car for the transportation of fuel oil between all points in what was described as Zone 5, in Portland, Oregon. The point of shipment of said oil shipments and all points in Guild's Lake or Guild's Lake district, including the junction of the line of plaintiff and the line of defendant and the oil spur of defendant, were located in said Zone 5. During the entire period of said shipments the duly and regularly filed and published charge for such trans-

portation under the Interstate Commerce Act as amended, and under the statutes of [36] the State of Oregon, was $8.55 per car; and the total transportation charge for said 286 cars of fuel oil was and is the sum of $2,445.30.

V.

Between January 8, 1930, and January 4, 1932, there were delivered to plaintiff as a common carrier, at Linnton in the City of Portland 657 carload shipments of fuel oil consigned to defendant at Guild's Lake, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guild's Lake in accordance with bills of lading issued to cover said shipments, and at Guild's Lake were delivered to defendant.

VI.

Theretofore plaintiff and defendant had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $8.55 per car for the transportation of fuel oil between all points in what was described as Zone 5, in Portland, Oregon. The point of shipment of said oil shipments and all points in Guild's Lake or Guild's Lake district, including the junction of the line of plaintiff and the line of defendant and the oil spur of defendant, were located in said Zone 5. During the entire period of said shipments the duly and regularly filed and published charge for such trans-

portation under the Interstate Commerce Act as amended and under the statutes of the State of Oregon, was $8.55 per car; and the total transportation charge for said 657 cars of fuel oil was and is the sum of $5,617.35.

VII.

Between January 2, 1932, and March 28, 1932, there [37] were delivered to plaintiff as a common carrier, at Linnton in the City of Portland, 87 carload shipments of fuel oil consigned to defendant at Guild's Lake, also within the City of Portland. All of said carload shipments of fuel oil were duly transported by plaintiff to Guild's Lake in accordance with bills of lading issued to cover said shipments, and at Guild's Lake were delivered to defendant.

VIII.

Theretofore plaintiff and defendant had filed with the Interstate Commerce Commission and with the Public Service Commission of Oregon and had published tariffs which stated a rate of $9.40 per car for the transportation of fuel oil between all points in what was described as Zone 5, in Portland, Oregon. The point of shipment of said oil shipments and all points in Guild's Lake or Guild's Lake district, including the junction of the line of plaintiff and the line of defendant and the oil spur of defendant, were located in said Zone 5. During the entire period of said shipments the duly and regularly filed and published charge for such trans-

portation under the Interstate Commerce Act as amended, and under the statutes of the State of Oregon, was $9.40 per car; and the total transportation charge for said 87 cars of fuel oil was and is the sum of $817.80.

IX.

The total charges which accrued and became due to plaintiff from defendant for said transportation of fuel oil from Willbridge to Guild's Lake and from Linnton to Guild's Lake, was and is the sum of $8,880.45.

X.

Through error and in the mistaken belief that de- [38] fendant was a participating carrier in the transportation of said shipments of fuel oil under the applicable tariffs, plaintiff heretofore and on or prior to April 26, 1932, allowed and paid to defendant as a division under said tariffs, one-half of the amount due and collectible for said transportation. Defendant was not a participating carrier and is not entitled under the applicable tariffs to a share in or a division of the tariff charge covering said transportation service; and because of said mistaken allowance and payment plaintiff has not charged or collected from defendant the full amount specified by said applicable tariffs for the transportation service rendered, and by reason thereof defendant is indebted to plaintiff in the amount of the allowance and payment so mistakenly made, being the total sum of $4,440.22.

CONCLUSIONS OF LAW

Plaintiff is entitled to judgment against defendant in the sum of $4,440.22, together with interest at the rate of six per cent (6%) per annum from April 26, 1932, and with costs and its disbursements to be taxed herein.

Dated this 30th day of October, 1934.

JOHN H. McNARY,
District Judge.

United States of America,
District of Oregon
County of Multnomah—ss.

Due service of the within Findings of Fact and Conclusions of Law is hereby accepted at Portland, Oregon, this 27th day of October, 1934, by receiving a copy thereof, duly certified to as such by C. A. Hart, of attorneys for Plaintiff.

JAMES G. WILSON,
Attorney for Defendant.

[Endorsed]: Filed October 30, 1934. [39]

AND AFTERWARDS, to wit, on Tuesday, the 30th day of October, 1934, the same being the 94th JUDICIAL day of the Regular July TERM of said Court; present the HONORABLE JOHN H. McNARY, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [40]

In the District Court of the United States
For the District of Oregon

No. L-12110

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Plaintiff,

v.

NORTHERN PACIFIC TERMINAL COMPANY, a corporation,

Defendant.

JUDGMENT

The above entitled action having been duly tried, and findings of fact and conclusions of law having been duly made and entered determining that plaintiff is entitled to judgment against defendant in the sum of $4,440.22, with interest at the rate of six per cent (6%) per annum from April 26, 1932;

IT IS ORDERED AND ADJUDGED that plaintiff have and recover from defendant the sum of $4,440.22, together with interest at the rate of six per cent (6%) per annum from April 26, 1932, amounting to the sum of $635.20, and with costs and its disbursements taxed herein in the sum of $26.00.

Dated this 30th day of October, 1934.

JOHN H. McNARY,
District Judge.

[Endorsed]: Filed October 30, 1934. [41]

AND AFTERWARDS, to wit, on Tuesday, the 30th day of October, 1934, the same being the 94th JUDICIAL day of the Regular July TERM of said Court; present the HONORABLE JOHN H. McNARY, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [42]

[Title of Court and Cause.]

ORDER EXTENDING TIME.

This matter coming on on the application of the defendant for allowance of the time within which to present a proposed form of Bill of Exceptions, and it appearing to the Court that the term is about to expire and for said purpose the additional time is necessary,

IT IS HEREBY ORDERED AND ADJUDGED that the defendant have to and including the 30th day of November, 1934, within which to present a proposed Bill of Exceptions, and that the plaintiff may have ten days after the service of said proposed Bill of Exceptions upon it within which to file objections thereto, and that the same shall thereafter be settled,

IT IS FURTHER ADJUDGED AND ORDERED that the present term of this Court be and the same is hereby extended for a period of three months from the date of this order for the completion of all necessary matters to perfect the record in this cause and for the consideration and settlement of all matters relating thereto, includ-

ing the settlement of the Bill of Exceptions and other matters for the perfection of an appeal in said cause, and the Court does hereby retain jurisdiction of said cause and of all matters connected therewith for the purpose of completing the record in said cause.

Done and dated this 30th day of October, 1934.

JOHN H. McNARY,
Judge.

Due service of the within Order Extending Time is admitted this 29th day of Oct. 1934.

C. A. HART,
Attorney for Plaintiff.

[Endorsed]: Filed October 30, 1934. [43]

AND AFTERWARDS, to wit, on the 11th day of December, 1934, there was duly FILED in said Court, a BILL OF EXCEPTIONS, in words and figures as follows, to wit: [44]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered that on the 14th day of March, 1934, the above entitled cause came on for trial before the Honorable John H. McNary, Judge of said Court, without a jury, a jury having been waived by stipulation of the parties in writing, filed in said cause. The plaintiff appearing by

C. A. Hart, of its attorneys, and the defendant appearing by James G. Wilson, of its attorneys.

Whereupon the following proceedings were had:

R. W. PICKARD,

called as a witness on behalf of the plaintiff, testified:—I am freight agent of the Spokane, Portland and Seattle Railway Company, plaintiff in this case, and have been such for ten years. Prior thereto I was engaged in railroad freight traffic work for about fifteen additional years; said work has involved the study and preparation, and making of rates and publishing of tariffs for line haul switching on railroads. I am familiar with the contracts and agreements under which service is performed by all of the common carrier railroads entering the City of Portland. For that purpose the city is divided into zones and rates prescribed for all within a zone and from zone to zone as shown on what is Exhibit 1, (this exhibit was later [45] introduced in evidence), which shows the different zones in the city. Upon this map the location of Linnton, Willbridge and Guild's Lake are shown—they are all in Zone 5. The Union Depot is in Zone 1. Across the river Albina is in a different zone. The entire east side is divided up into different zones.

The Standard Oil Company's plant at Willbridge is about a mile from Guild's Lake and Linnton is about four miles from Guild's Lake.

ICC No. 276 is the tariff which states the rate

(Testimony of R. W. Pickard.)

from one point to another in Zone 5. This tariff names all of the switching rates within the zones and between zones, which are defined in the tariff, limited to traffic in which there is no other line haul involved. This intra-terminal and inter-terminal and intra-plant switching is in the nature largely of a substitute for drayage service to get a car from one industry to another both within the confines of the City of Portland. This applies only within the City of Portland, independent of how the car came into Portland in a line haul movement. The rates do not apply where the car has been line hauled by any common carrier. If the car has been line hauled for instance from Spokane to Portland, and if it requires a switching service to get it to any particular industry in any part of the city, that switching would be covered by what is called the line haul tariff, that is, in an entirely different tariff from the zone switching tariff. This zone switching tariff applies only to independent movements of freight from one point to another in the city. Thereupon the current zone switching tariff, with all supplements, was offered by the plaintiff and received in evidence as plaintiff's Exhibit 2, without objection. Thereupon there [46] was offered and received in evidence, the map showing the switching zones within the Portland switching district, as plaintiff's Exhibit 1, without objection.

By separate agreement the switching revenues

(Testimony of R. W. Pickard.)

received under this tariff are divided equally between the carriers that participate in the switching movement. So that if there were only two carriers in the service they would divide the switching revenue equally between them.

At the Guild's Lake terminal there is located a make-up and break-up yard of the defendant company—that is a yard where trains are made up and broken up, and there are also other facilities there. When the S. P. & S. has a car of oil given to it at Willbridge with shipping directions or bill of lading that requires transportation, for illustration, to Eastern and Western Lumber Company, that car is hauled to Guild's Lake and there turned over to the Terminal Company for further movement to the Eastern and Western plant. In that case two carriers would participate and whatever the tariff rate is they would divide the revenue between them.

COURT: That is where you make the connection at Guild's Lake?

Mr. HART: Instead of using the term delivery, I would say interchange, because deliveries might connote destination. But Guild's Lake would be the point at which the S. P. & S. would turn over the shipment to the other carrier. That is correct.

A. Yes, that is the recognized point of interchange with the Terminal Company.

(Testimony of R. W. Pickard.)

If the transfer were to the Southern Pacific or Union Pacific the Terminal Company acts for the other railroads and would take the car in interchange. If, for instance, the [47] S. P. & S. had a car of oil that the Standard Oil Company gave it, at Willbridge, and the shipping direction or bill of lading, called for the movement of it to the Libby plant on the east side, which is on the Southern Pacific track, the S. P. & S. would turn that over to the Terminal Company at Guild's Lake interchange, as agent for the Southern Pacific Company, and that would virtually be S. P. & S. and Southern Pacific transportation.

The phrase "company material" is applied to commodities that are owned by one of the companies participating in the transportation of them. If S. P. & S. were given, by the Standard Oil Company, at Willbridge, a car of oil, and a bill of lading issued, calling for the transportation of that oil, for instance, to the Southern Pacific Company at its Brooklyn yards, what we would do with that car would depend upon the bill of lading that was issued at Willbridge. If it called for Southern Pacific, as consignee, the destination as Brooklyn, there is also a space provided on the Standard Oil Company's bill of lading for a routing, and if that routing were designated by the shipper as S. P. & S. we would turn the car over to the Southern Pacific at Guild's Lake interchange and the Southern Pacific, being the consignee, would

(Testimony of R. W. Pickard.)

pay the prescribed switching rate from Willbridge to Brooklyn, and the money thus collected would be divided half-and-half between the two carriers. If the shipment was billed to the Southern Pacific Company at Guild's Lake, which could be done, our contract with the shipper for carriage would cease at Guild's Lake interchange, and we would collect the switching charge from Willbridge to Guild's Lake, and the Southern Pacific would handle it in any manner it saw fit, [48] and we, having made delivery, the Southern Pacific would have full control over it on arrival at Guild's Lake.

The tariff, Exhibit 2, was originally built, or contructed, on the basis of naming all of the industries located within the zones, and it has been, since the original issue, during Federal control in 1918, supplemented from time to time in a network to keep it up to date in that respect by adding industries, or taking them away, as the case might be. If an industry went out of business the name was eliminated; if a new industry came in it was added with the purpose of at all times keeping it as nearly as possible an up to date guide as to the location for these industries within the given zone. The particular location of the industries in the zone is not a matter of importance so far as the application of the rates named in the tariff is concerned, but it is of importance to determine in what zone an industry might be located for the information, we will say, of someone unfamiliar

(Testimony of R. W. Pickard.)

with the territory. It would not make any difference in what part of the zone an industry was located for the rates to all points in that particular zone would be the same. The industries located in these different zones are listed alphabetically in Exhibit 2. For example, under "A" you will find the name Albers Dock No. 1, Zone 1. Similarly under the caption "C" California Packing Company, Zone 6. That might be followed right through with all of the letters of the alphabet.

> "MR. WILSON: Is it your contention, Mr. Hart, if no track is designated in that alphabetical list, you cannot make a delivery on any such track?
>
> MR. HART: No." [49]

Returning to the question of transportation of company material. I gave the illustration of a shipment consigned to the Southern Pacific at Brooklyn. The Southern Pacific might take delivery at the point of interchange, and, in that event, the only switching charge that would be collected would be simply the one covering the S. P. & S. where the shipment was turned over to the Southern Pacific. Whereas, if it was billed to Brooklyn, then the Southern Pacific would be a participating carrier, and the switching charge would be collected for the entire movement from Willbridge to Brooklyn, and then divided equally between the two.

(Testimony of R. W. Pickard.)

"Q. Take then the case of a shipment of oil consigned to the Northern Pacific Terminal Company at the Union Depot, passenger depot, if that was billed Guild's Lake what would be done with it?

A. If that was the way the bill of lading read, we would deliver it to the Terminal Company on the Guild's Lake interchange and consider we had performed all of the service we were called upon to perform on the bill of lading, and apply the rate for switching.

Q. From Willbridge to Guild's Lake?

A. Yes."

And in that case the Terminal Company would not be interested in the tariff switching except for payment of our charges to Guild's Lake interchange. Their own movement from Guild's Lake to Union Depot would be something exclusively within their own control, and they would not charge or collect, or participate in the tariff switching revenue, but if the shipment was billed to the Terminal Company at Union Depot, which is in Zone 1, we would apply the rate from Zone 5, where the Standard is located at Willbridge, to Zone 1, and divide [50] the revenue with the Terminal Company on the agreed basis. In that case the Terminal Company would be a participating common carrier, sharing in the switching tariff movement and sharing in the revenue.

(Testimony of R. W. Pickard.)

"Q. Now then, on shipments that are consigned to the Terminal Company, Guild's Lake, without any further statement in the shipping direction or bill of lading, state whether or not the Terminal Company is free to make any disposition it desires of the shipment after it has received it from the S. P. & S. at Guild's Lake.

A. The bill of lading or contract of carriage governs. Those directions we get from the shipper and not from the consignee. When he presents a bill of lading consigning a car of oil to the Terminal Company at Guild's Lake, and we interchange it and deliver it there, we have completed our contract.

Q. Now, let us carry that illustration a bit further (These questions, your Honor, are designed to try to make clear the controlling influence of the bill of lading or shipping direction given by the shipper): Take the case of a car billed to the Terminal Company at Guild's Lake, the contention made by the defendant in this case is that the Terminal Company should have half of the switching revenue because it has moved that shipment somewhere from that point, from the point of interchange. But if that is so, could the Terminal Company take such a shipment and move it all the way to the Union Depot on its own account and still collect half of the S. P. & S., still take half of the S. P. & S. switching charge from Willbridge to Guild's Lake—couldn't it?

(Testimony of R. W. Pickard.)

A. No they couldn't take half of the S. P. & S. switching charge.

Q. Stop and see if they could not. I am talking about a case now where a car is brought from Willbridge to Guild's Lake, consigned to the Terminal Company at Guild's Lake, and turned over to the Terminal Company there. Now, then, they do what they please with it, and they say to you, "We must have half of the switching charge from Willbridge to Guild's Lake because we have to do something more with it." But they actually move it from their interchange track to the Union Depot. In such a situation, if their contention is correct, would they not then be collecting half of the S. P. & S. revenue?

A. Under such a condition, they would. I wasn't clear on your question the first time."

[51]

Guild's Lake is in Zone 5, and the oil spur at Guild's Lake is also in Zone 5, close to the switching track, and the rate from the origin point, either to the interchange track or oil spur at Guild's Lake, is the same. If the oil belonged to some other concern than the Terminal Company, and was carried into Zone 1, there would be an additional charge. In that case the oil would be billed through from the point of origin to point of destination as one charge and it would be divided between the two carriers. The oil here in question

(Testimony of R. W. Pickard.)

was all billed to Guild's Lake. When a car of oil is consigned to Terminal Company, billed to Guild's Lake, the car is delivered to the Terminal Company on one of these interchange tracks at Guild's Lake, and they could send it to the Union Station, or to San Francisco, or any place it might wish to dispose of it, and it could rebill it, and the new transportation that has to be undertaken would have nothing to do with the S. P. & S. and the S. P. & S. would have no knowledge of it at all; and if this contention of the defendant is correct they could still get half of the S. P. & S. revenue on this switching from Willbridge to Guild's Lake, provided the Terminal Company was consignee. In such a case the S. P. & S. has no means of knowing whether the cars are actually moved into the oil spur at Guild's Lake and unloaded there, or whether it is taken someplace else. The S. P. & S. is governed entirely by the bill of lading that is tendered by the shipper, and not by the consignee. So far as we have been able to find from the records available the bill of lading destination specified by the shipper in all of these shipments was Terminal Company at Guild's Lake. The records, back of 1928, I think, have been destroyed. I have some bills of lading—I think another witness will have probably a more complete set but these are typical of the bills of lading issued on these shipments, at least. [52]

(Testimony of R. W. Pickard.)

On

CROSS-EXAMINATION

by Mr. Wilson, witness further testified:

The bill of lading, which is handed me, I would not say was typical of the billing of shipments in this case from the Standard Oil Company to the Terminal Company from our records. This particular shipment is billed to the Terminal Company, destination Guild's Lake, Portland. The information which we have indicates that in the early years of this movement shipments were merely billed Northern Pacific Terminal Company, Guild's Lake, without further designation. This bill of lading purports to be a carbon copy of one of the bills of lading that were made out by the Standard Oil Company and presented to our agent at Willbridge for signature. It is marked "copy" and appears to be a copy and that is the signature of our agent, and I think it is a copy of the bill of lading issued on one of the shipments involved in this controversy.

This bill of lading reads, "consigned to Northern Pacific Terminal Company, Guild's Lake, Portland, State of Oregon. Route, S. P. & S.—N. P. T." N. P. T. in connection with the route suggests nothing to me. Normally such a designation as N. P. T. would indicate that the Terminal Company was to participate in the transportation but on this bill of lading with the destination shown as Guild's Lake where we deliver the shipment it means nothing.

(Testimony of R. W. Pickard.)

Whereupon said bill of lading was offered and received in evidence without objection and marked defendant's Exhibit A.

COURT: What significance, Mr. Wilson, do you attach to those initials?

Mr. WILSON: The significance I attach to them is this: That the Standard Oil Company when it made out that bill of lading understood [53] that both the Spokane, Portland and Seattle Railway Company and the Northern Pacific Terminal Company were to be carriers on the line from the point of origin to the point of destination.

On my direct examination, I stated, that if the Spokane, Portland and Seattle Railway Company received a shipment from Standard Oil Company directed to the Southern Pacific, Guild's Lake, and it were so billed by the shipper, the Spokane, Portland and Seattle Railway Company would take the entire revenue, and if it were billed Southern Pacific, Portland, Oregon, with routing designated in bill of lading S. P. & S.—N. P. T. if I were agent at Willbridge or Linnton I would not accept the shipment, I would ask for some point of delivery to be designated on the bill of lading. If the point of delivery, as specified by the agent of the shipper said "up in the Union Station Yard" I would ask him to modify his bill of lading accordingly and I would divide the revenue with the Terminal Company on a fifty fifty basis if it were

(Testimony of R. W. Pickard.)

billed to the Southern Pacific Union Depot. If it were billed to the Southern Pacific Guild's Lake repair shop, routed S. P. & S.-N. P. T. I would apply the rate applicable to the zone and divide the revenue fifty fifty with the Terminal Company. If it were billed Southern Pacific, East Portland, routing S. P. & S.-S. P. I think that car would be delivered to the Terminal Company as agents for the Southern Pacific at the Guild's Lake interchange and we would divide the revenue with the Southern Pacific. [54]

In these cases I am considering, the fact that the oil is the property of the Southern Pacific would make no difference in our division of revenue. I do not know whether we are receiving and accepting billings Southern Pacific East Portland, routing S. P. & S. and S. P. There is a movement of fuel oil for the Southern Pacific Company today but how it is being billed I cannot tell you. The paper you hand me, by its heading purports to be a Southern Pacific Company switching settlement statement which is an accounting department record. It would indicate a movement of two cars of fuel oil from the Richfield Oil Company to the Southern Pacific at East Portland and the revenue was divided fifty fifty. The junction of interchange not being shown.

There is no question in my mind that the interchange point was Guild's Lake yard but this paper does not represent, in any way, the directions of the shipper to the S. P. & S. I cannot say whether

(Testimony of R. W. Pickard.)

this shipment was billed to the Southern Pacific at East Portland. It is an accounting department record and not a bill of lading. It is a fact that the Southern Pacific could have a shipment billed from Richfield Oil Company at Linnton to it at East Portland, and take it right on through to Brooklyn and pay the S. P. & S. only its proportion of the revenue accruing up to East Portland. I am not prepared to say whether or not this is done.

Under the rulings of the interstate commerce law the railway company, may, with its company material, either bill it to the nearest junction point or bill it through where a through rate exists, whichever is the most advantageous to it. [55]

I think the Southern Pacific is billing its shipments of fuel oil to East Portland and carrying them right through and sending them out to Brooklyn. I think that is what is going on. I think they are billing it and taking advantage of whatever plan is most advantageous to them. From the switching statements, now handed me I am unable to say whether or not the Northern Pacific Company is shipping today from the Sunset Oil Company, or has been since January 1, 1933, from its plant at Linnton, or, that on such shipments the S. P. & S. is delivering cars to the Terminal Company at the transfer track, and that the Terminal Company picks it up there and takes it over to the roundhouse, and puts it into the identical tank that it unloads its own fuel oil into. These records are

(Testimony of R. W. Pickard.)

accounting department records but obviously from them the movement is occurring but what the direction of the shipper is is something I cannot tell from the accounting department records, but these accounting department records indicate that there is a movement between Linnton and some point on the Terminal Company but such records do not show where the delivery is made or anything, they simply indicate that there is a movement of fuel oil between Linnton and some point on the Terminal Company but do not even indicate it is Northern Pacific Railway Company fuel oil. These records do not show either consignor or consignee. The copy of the bill of lading issued by the S. P. & S. on March 10, 1934, covers two carloads of fuel oil covered by one bill of lading, shipped by the Sunset Pacific Oil Company at Linnton, consigned to the Northern Pacific Railway Company. Destination is shown as Northern Pacific Terminal Company. Oil Spur, Portland, Oregon, routing S. P. & S. The destination as billed, would indicate that it is going on an oil spur on [56] the Terminal Company's tracks, although the routing is not complete. The phrase "Northern Pacific Terminal Company, Oil Spur", as the destination would imply that the oil spur is located someplace on the Terminal Company's track. Said bill of lading was offered and received in evidence, marked Exhibit "B". Even if that "Oil Spur" were not on the bill of lading we would make delivery to the Northern Pacific

(Testimony of R. W. Pickard.)

Terminal Company at Guild's Lake Yard and consider our service was ended because the only routing shown on the bill of lading made out by the shipper is S. P. & S.

Q. (Mr. Wilson) Is it your contention here—let me get this right—that if this oil on which this controversy is now based had been billed by the Standard Oil Company to the Northern Pacific Terminal Company, oil spur, Portland, Oregon, or Northern Pacific Terminal Company, oil spur, Portland, Oregon, then the Northern Pacific Terminal Company would have been entitled to participate in the revenue? Is that correct?

A. Yes, if the bills of lading had been tendered showing the Northern Pacific Terminal Company as the consignee, or destination the Northern Pacific Terminal Company oil spur, Guilds Lake.

If Guilds Lake were omitted, and the destination Oil Spur, Portland, Oregon, and the routing S. P. & S.-N. P. Terminal Company I think there would have been no question. If the bill of lading read "The Northern Pacific Railway Company, N. P. Terminal Co. Oil Spur, Portland, Oregon, route S. P. & S. I think, if I were accepting the shipment I would ask some questions of the shipper first as to what routing that shipment should take; S. P. & S. obviously not being able to make delivery to

(Testimony of R. W. Pickard.)

the billed destination. The shipment, under defendant's Exhibit "B", reading as above designated, to wit:- "The Northern Pacific Railway Co., N. P. Terminal Co. Oil Spur, Portland, Oregon, route S. P. & S", was apparently transported. While I cannot say definitely what was done with it I imagine the car was delivered to the Terminal Company at Guilds Lake, and that it [57] is a fair assumption that it was moved by the Terminal Company over to the oil spur at the roundhouse in Guilds Lake, and I think in that situation the revenue would be divided fifty fifty, between the S. P. & S. and the Terminal Company, or with the Northern Pacific Railway Company, through the N. P. Terminal Company or vice versa.

"Q. Let me get that right. You have drawn a distinction which obtains. You said that the oil to the Southern Pacific, if it were billed to the Southern Pacific at the Union Station, the Southern Pacific would not participate in the revenue, but the Terminal Company took half the revenue? Isn't that correct?

A. Yes.

Q. In that kind of shipment, the Terminal Company is not considered an agent of the Southern Pacific unless some part of the haul is on the line of the Southern Pacific independent from the Terminal Company. Isn't that correct?

(Testimony of R. W. Pickard.)

A. In case of the shipment going to the Union Depot?

Q. Yes.

A. Billed Southern Pacific, Union Depot?

Q. Yes.

A. No, I would consider them as the agent of the Southern Pacific.

Q. Even when it does not go off the Terminal Company's track?

A. Yes. I don't know whether—go ahead, ask me another question, and I will answer that a different way.

Q. All right. You know, don't you, that the Northern Pacific Railway Company does not participate in any of the revenue on the oil from Linnton to the oil spur, Guilds Lake?

A. As a railroad?

Q. As a railroad?

A. That is correct. [58]

Q. And that the entire revenue is paid to the Terminal Company, as a railroad? I mean the entire half of the revenue.

A. That is correct, I think.

Q. Now, isn't the reason for that that the Northern Pacific Railway Company does not participate in any part of the haul independent of the Terminal Company?

A. They would not in the case of this Exhibit "B".

Q. Well, wherein does that differ from the

(Testimony of R. W. Pickard.)

illustration I gave you with the Southern Pacific delivery at the Union Station?

A. I don't think it is different. If I remember correctly, your Southern Pacific case was a car of oil billed to the Southern Pacific at the Union Depot.

Q. Yes.

A. Now, what is it you wish to ask about that?

Q. I say, would or not the Southern Pacific participate in the revenue on that oil?

A. No. The Terminal Company would be the carrier. Presumably specified by the shipper as the carrier.

It was stipulated between the parties that a shipment of car wheels originating in the S. P. & S. yard at Portland consigned to Pullman Supply Yards in Guild's Lake Terminal, was carried and transferred to the Terminal Company and carried by the Terminal Company to the Pullman Supply Station or Warehouse in the Guild's Lake yard, and that the S. P. & S. and the Terminal Company divide the revenue, and it was also conceded that the Pullman Company Warehouse is just 200 feet along the same track beyond the oil delivery place (oil spur) at the roundhouse. In reference to this stipulation defendant maintains that this is not a case of company material and that the Pullman Company, in this regard, is like any other shipper. [59]

(Testimony of R. W. Pickard.)

COURT: The question in this case is whether delivery should be made at Guilds Lake interchange, or whatever you call it?

Mr. HART: The S. P. & S. turns it over in any event to the Terminal Company at the interchange track. Now, the question is whether that is completion of the switching movement that was contracted for.

COURT: In other words, whether the obligation is at an end there. If your obligation is at an end there?

Mr. HART: Our obligation is at an end.

COURT: Is that your contention here, or whether you have to take it on to the end, whether you have to have the services of the Northern Pacific Terminal Company, whether the switching service that was contracted for down there at Willbridge included something more. In other words, whether it includes that that shipment should in the end be taken to Guilds Lake or some place else. If your obligation requires you to take it to its end, and you deliver it to the Terminal Company at Guilds Lake, then there would be in fact two carriers operating, wouldn't there?

Mr. HART: That is Mr. Wilson's contention.

COURT: That is the only thing there is to the case, isn't it: Whether or not on the bill of lading you were to deliver it one place, or whether it had to go to another?

(Testimony of R. W. Pickard.)

Mr. HART: That is correct. Of course, they would do the actual delivering.

COURT: If you had to have the services of the Terminal Company in order to complete delivery, then the revenue should be divided?

Mr. HART: Yes.

COURT: Am I right?

Mr. WILSON: I agree with you thoroughly.

When I said that all of the lists of the industries' spurs were included in the switching tariff offered here as Plaintiff's Exhibit 2, I do not mean to say that delivery could not be made on tracks, other than those indicated in the alphabetical list.

Referring to plaintiff's Exhibit 2, the Southern Pacific is listed as being in Zone 2, Southern Pacific hop warehouse, Southern Pacific open dock and not otherwise. On shipments of oil consigned to Southern Pacific at East Portland, I would think they might or might not be delivered at either one of those points—it is problematical. [60]

As a matter of fact I know that all of the oil we are shipping over the Southern Pacific consigned to East Portland is not going to one or other of the places listed. I don't find the Pullman Company's industrial track on this Exhibit (plaintiff's Exhibit "2"). I cannot say that all the car wheels that are put on the Union Pacific cars, and those put on the Pullman Company's cars, and those on the Southern Pacific equipment, and those put on

(Testimony of R. W. Pickard.)

the Great Northern equipment, are all shipped down there to those various individuals, as we do not handle them but it would not be unusual for there to be such shipments to a terminal of that character.

In a general way the agreement between the Terminal Company and the S. P. & S., with reference to transfers, is that a terminal company officer designates the track that the transfer shall be made on on loads coming to the Terminal Company. On loads coming to the S. P. & S. it is the common practice for the S. P. & S. to designate what track shall be the transfer track. For instance, if the Terminal Company had a track south of Guild's Lake Terminal, and north of Nicolai Street, and it designated to the S. P. & S. that that should be the transfer track on cars delivered from the S. P. & S. to the Terminal Company, I believe it would be within its rights, to do so. On shipments of oil coming from Willbridge, consigned to the Terminal Company at Guild's Lake, I would not consider that a delivery had been made if the transfer track were located on the south outside of Guild's Lake. [61]

If the interchange point were outside of Guilds Lake on shipments of oil coming from Willbridge, consigned to the Terminal Company at Guilds Lake, I would consider the billing sufficient to permit the Terminal Company to participate in the revenue.

The letter you hand me was written in my office,

(Testimony of R. W. Pickard.)

by my authority, and purports to be in response to the one immediately preceding it, addressed by E. L. Brown, comptroller of the Terminal Company, to Mr. H. Sheedy, agent, S. P. & S. Railway Company, it being stipulated between the parties that these letters might be admitted without further identification. Whereupon said letter, dated August 18th, 1926, was received in evidence and marked defendant's Exhibit "C", and the letter of August 26th, 1926, in answer thereto was received in evidence, marked defendant's Exhibit "D", which letters were read as follows:

August 18, 1926

Mr. H. Sheedy, Agent,
Spokane, Portland & Seattle Railway Co.
Portland, Oregon

Dear Sir:

Upon investigation of cars delivered by S. P. & S. Ry. to Nor. Pac. Terminal Company of fuel oil, billed to N. P. T. Co., we find all the revenue is absorbed by the S. P. & S. Ry. We think this practice is wrong as under the switching tariff the Nor. Pac. Terminal Co. should get 50% of this revenue.

We have had this matter up with our General Yardmaster and he reports as follows:

> "S. P. & S. merely deliver to us in transfer at Lake Yard loaded. We set cars to roundhouse and heating plants for unload-

(Testimony of R. W. Pickard.)

ing. When cars are empty we return to S. P. & S. (Deliver them into their Yard).'

[62]

It is manifestly evident that the Terminal Company performs a part of the switching after receiving the cars from you, also in delivering the empty cars back to your yard. Under the arrangement of the zone switching tariff, we are entitled to 50% of the revenue where two companies participate in the switching.

Please acknowledge receipt.

Your truly,

E. L. BROWN".

The letter of Mr. Pickard reads as follows:

Portland, Oregon, August 26, 1926.

Mr. E. L. Brown, Comptr.,
Northern Pacific Terminal Co.
Portland, Oregon.

Dear Sir:

Your letter August 18th, file C-141, addressed to Mr. H. Sheedy, has been referred to this office.

Inasmuch as these cars are consigned to the Terminal Company, inso far as the SP&S is concerned, when they are set by us on the interchange with your line we are no longer interested in what is done with them. Delivery has been made to the Terminal Company at the

(Testimony of R. W. Pickard.)

nearest point and to give you a refund through the subterfuge of permitting you to participate in the division by reason of your switching it from the interchange over to the roundhouse, it seems to me would be nothing more or less than a modified form of rebating, in view of the oft expressed opinion of the Interstate Commerce Commission that a carrier performing service for another carrier, as we are doing for you in this instance, must make the same charge against such other carrier as they would contemporaneously make against any other shipper or consignee.

Your truly,

R. W. PICKARD,

General Freight Agent". [63]

Guilds Lake covers not only the make up and break up yard but also the roundhouse and other facilities at that point; they have a place for car storage and cleaning, and I imagine have a large supply warehouse there where they keep general supplies for their equipment, and I am sure that they have car repairers down there making repairs on the cars. Guilds Lake covers not only this so called make up and break up yard but it covers all of the tracks and facilities there. It is called the Guilds Lake terminal. What the designation on a bill of lading "Guilds Lake" might mean from the standpoint of the shipper is questionable.

(Testimony of R. W. Pickard.)

Q. Is there any place to take delivery of a shipment in what you call the make-up and break-up yard?

A. That would be entirely possible of any one of those tracks.

Q. I mean, you would have to dump it out on the ground? There are no platforms there to deliver shipments, are there?

A. Speaking of fuel oil, a tank car can be drained almost any place.

Q. Right on the ground; but they don't ordinarily do that, do they?

A. No, they do not.

Q. And these four or five thousand cars, or whatever they are, you don't think they have so drained on the ground out in the make-up and break-up yard, do you?

A. No, no.

The S. P. & S. have no interest in the Guild's Lake [64] yard whatever. They have no running right on the tracks in the yard, other than a working arrangement for making an interchange, and if the Northern Pacific Terminal Company had not designated that track as a transfer track the S. P. & S. would not have the right to even turn a switch to get in there.

RE-DIRECT EXAMINATION

For instance the Oregon Electric Company, which runs from Portland to Eugene—if the Oregon Elec-

(Testimony of R. W. Pickard.)

tric bought a piece of electrical equipment from the General Electric Company in New York, and wanted that equipment brought to Eugene, Oregon, via Portland—the Oregon Electric could have that piece of equipment consigned to it at Eugene, and if it did so then the published tariff rate from New York to Eugene would apply and the Oregon Electric would have a share or what they call a division of that through rate. If more advantageous, the Oregon Electric could have that piece of machinery consigned to it at Portland, and take delivery at Portland, and then move it down to Eugene in any way they saw fit. In that case the Oregon Electric would not be a participating carrier and would have no share in the rate collected for the common carrier transportation, and when it moved it to Eugene it would simply be out whatever it cost to haul it down there; similarly, the Northern Pacific Company buy oil at Willbridge or Linnton which they might want to use at the Union Depot, in which event, the tariff rate covering the movement from Zone 5 into Zone 1 would be collected, and then the amount collected would be divided equally between the S. P. & S. and the Terminal Company, or if the Terminal Company found it more to its advantage that shipment could be billed to the Terminal Company at Guild's Lake, or Guild's Lake yard, or Guild's Lake Terminal, whichever they might choose to call it, [65] then in that case the Terminal Company, as the consignee,

(Testimony of R. W. Pickard.)

would take possession of that shipment at Guild's Lake and the only tariff charge that would be collected for that movement would be the tariff charge applicable from Willbridge to Guild's Lake.

On shipments billed to the Terminal Company at Guilds Lake, the Terminal Company could, as consignee, if it desired, take delivery right on the interchange track, and that is exactly what was done. On these shipments, billed to the Terminal Company at Guilds Lake, there was no restriction of any kind upon what the Terminal Company could do with them after they got them on the interchange track. They could unload them right there if they wanted to transfer them to another car, or they could consign them to the Depot in another zone, or any where else, or they could leave them right there on the interchange track in which event there would be no right to a fifty fifty division or to charges for moving that shipment from Willbridge to Guilds Lake Yard.

RE-CROSS EXAMINATION

The Terminal Company never directed us or stated to us that they would take delivery on the transfer track. We had no special instructions—we were complying with the bill of lading instructions from the shipper.

Q. Did the Standard Oil Company, the shipper, ever direct you to make delivery to the Terminal Company on that transfer track?

(Testimony of R. W. Pickard.)

A. Yes, by simply designating Guilds Lake on the bill of lading. * * *

Q. But otherwise than by their bill of lading, they never instructed you to make delivery on that transfer track?

A. Those are the only instructions we ever get from the shipper, is the bill of lading.

Q. Then would you consider a bill of lading such as Defendant's Exhibit "A", which designated [66] the route as S. P. & S. and N. P. T. Co. a direction to deliver it on a transfer track?

A. That would be my understanding of the instructions of the shipper on this sort of bill of lading.

Q. With that routing?

A. Yes.

Q. Where then did the N. P. T. participate in the carriage, or were they supposed to participate in the carriage?

A. I think the designation of N. P. T. as part of the route on this bill of lading, where the designation is reached by the originating carrier, is of no consequence to the carrier.

Q. In other words, disregard N. P. T. Company in that routing?

A. Yes.

J. A. JOHNSRUD

called as a witness on behalf of the plaintiff and testified as follows:

I am chief clerk of traffic accounts for the S. P. & S. I have had charge of the freight and passenger accounting of the S. P. & S. for a little over three years. I have been connected with the accounting department from 1910 to 1920, and again from 1927 up to the present time. In my present position I have custody of the records dealing with the accounting on switching in Portland. The bills of lading, you hand me, dated from January, 1931, to January, 1932, are shipping orders issued by Richfield Oil Company for the movement of cars of fuel oil from Linnton, Oregon, to the Northern Pacific Terminal Company at Guild's Lake. They are the original records of the agent [67] at Linnton. I have examined the bills of lading covering the movements of such fuel oil from Linnton to the Terminal Company, from the 1st day of January, 1930, through 1931, and would say they are commonly made out in the same way for such shipments so far as the destination is concerned. Whereupon these bills of lading were marked plaintiff's Exhibit 3.

"COURT: Is there any particular place on Guild's Lake that is generally known, or known in railroad circles, as Guild's Terminal?

Mr. HART: I think, your honor, we all understand that the term generally means that it is the district".

(Testimony of J. A. Johnsrud.)

The movement of fuel oil to the Northern Pacific Terminal Company from Willbridge began in 1923, and continued up to 1930. The bills of lading, so far as copies are now available, show that the oil was billed by the Standard Oil Company of California, to the Northern Pacific Terminal Company, at Guild's Lake, Oregon. In other words, Guild's Lake, routed S. P. & S.-N. P. T.

The question of dividing the switching revenue first came up in August, 1926, that is when the letters, that we have already referred to, occurred. From 1923 to 1926, the S. P. & S. retained the entire switching revenue for the movement. During those three years I have no record of any claim by the Terminal Company that it was entitled to share in the switching revenue. The letters show that in [68] August, 1926, the comptroller of the Terminal Company made a demand to be allowed to share equally in the switching revenues. Mr. Pickard answered, on August 26th., saying that he thought it would be unlawful, and after this rejection by Mr. Pickard, I have no further record of any claim on the part of the Terminal Company until 1930; so that for the seven years in which the Terminal Company was getting its oil at Willbridge, and having it shipped in this way, from Willbridge to Guild's Lake, the S. P. & S. took the entire revenue.

In January, 1930, the movement from Willbridge was discontinued and the Terminal Company began

(Testimony of J. A. Johnsrud.)

buying their oil and having it shipped from Linnton. After the Terminal Company began shipping their oil from Linnton the switching revenue was divided between the Terminal Company and the S. P. & S. on a fifty percent basis.

Sometime in the past it was determined that the Portland Electric Power Company was entitled to share in the switching revenue on shipments moving to that company. I think somewhat based on that interpretation, we permitted the N. P. Terminal Company to retain half of the revenue, with an understanding that the haul extended beyond the interchange track at Guild's Lake. That division of the switching revenue began in January, 1930. On April 1, 1932, the Terminal Company made demand that the same division of switching revenue be made with respect to the past shipments that had moved from Willbridge. That is they wanted the S. P. & S. to make an adjustment on shipments moved from Willbridge prior to January 1, 1930. Pursuant to that demand the S. P. & S. went back three years from April 1, 1932 and adjusted the accounts by paying over to the Terminal Company one half of the switching revenues [69] on these Willbridge-Guild's Lake oil shipments between April 1, 1929, and April 1, 1932, or to be accurate between April 1, 1929, and December 31, 1930, because December 31, 1930, was the date on which the Willbridge shipments ended. In other words, the S. P. & S. made this adjustment as to Linn-

(Testimony of J. A. Johnsrud.)

ton shipments, when the shipments began moving from that point, and the S. P. & S. honored the Terminal Company's request for a division of the Willbridge revenues, as far back as April 1, 1929, and that was all done based on the ICC ruling given by Mr. Hart on Portland Electric Power shipments just referred to. When the Linnton shipments commenced the S. P. & S. divided the switching revenue with the Terminal Company without a demand from the Terminal Company based on the ruling. As to the oil that had moved from Willbridge—the first demand made by the Terminal Company, after the 1926 demand, was in April, 1932. We had discontinued giving the Terminal Company this division when the business from Linnton discontinued. It was then that the present controversy came up. It was in March, 1933, that we rebilled the Terminal Company for the revenue that we had allowed them. There were no further Terminal Company shipments after that date.

"COURT: Prior to 1926, did you have shipments of oil and fuel, the same character of shipments prior to 1926 for the Terminal Company as you had since then?

A. Yes.

Q. The bills of lading read substantially the same.

A. Yes.

Q. And delivered at this exchange place?

A. Yes. [70]

(Testimony of J. A. Johnsrud.)

CROSS EXAMINATION

When I say there had been no demand made upon the S. P. & S. for an adjustment of the switching revenues from the inception of this business I am speaking simply from the state of the correspondence between the two companies. I did not come to Portland until 1927. It is possible that there may have been discussions between the railroad officials on the question of dividing the switching revenues but I have no knowledge of it. When I say that after 1930, when this adjustment was made, that there was no demand for back adjustments until 1932, I am also speaking from the correspondence. When I say that the next demand was in 1932 I am referring to a letter of April 1, 1932, from Mr. Shibell, the comptroller of the Terminal Company, addressed to Mr. Crosbie, comptroller of the S. P. & S. Whereupon the letter of April 1, 1932 is offered and received in evidence without objection and marked defendants Exhibit "E", and reads as follows:

April 1st, 1932

Mr. Robert Crosbie, Comptroller,
Spokane, Portland and Seattle Railway Co.
Portland, Oregon.
Dear Sir:

Please be referred to your letter dated April 18, 1930, file TR 382-N, relative to switching charges on fuel oil consigned to Northern Pacific Terminal Company.

(Testimony of J. A. Johnsrud.)

Corrections of the switching charges as reported by your agent at Linnton, Oregon, on statements issued to January 1, 1930, were made on statements No. 8, 19, 20, 21 and 22, to the Northern Pacific Terminal Company, April 1930 accounts, and refund of the overcharge in the switching rate was made to the Northern Pacific Terminal Company through our Bill Collectible No. 14687, May 1930 accounts.

Since this time a check was made of all freight settlements, which developed that switching charges were not corrected on switching settlement statements, of all fuel oil for the Northern Pacific Terminal Company moving [71] from the Standard Oil Company's plant at Willbridge, Oregon, to the Northern Pacific Terminal Company's set out track at Guilds Lake, period February 1st, 1923, to December 31st, 1929. This would involve a reporting to the Northern Pacific Terminal Company of one-half of the zone rate of $8.55 per car, covering movement during that period.

Please advise if you will prepare settlement statement reporting this revenue to the Northern Pacific Terminal Company, or if it will be necessary for us to prepare a Bill Collectible versus the Spokane, Portland and Seattle Railway Company to recover our proportion of these switching charges.

Yours truly,

C. B. SHIBELL."

(Testimony of J. A. Johnsrud.)

The answer to that letter is dated April 25, 1932, the same being offered and received in evidence, without objection, marked defendant's Exhibit "F", and reads as follows:

"Portland, Oregon, File No. TR 382-N
April 25, 1932

Mr. C. B. Shibell,
Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon

Switching Charges on Fuel Oil for Northern Pacific Terminal Company

Dear Sir:

Referring to your letter of April 1st, 1932, file 141V7 relative to adjustment of switching settlement statements in connection with fuel oil moving from Standard Oil Company's plant at Willbridge to the Northern Pacific Terminal Co. at Guilds Lake:

The statute of limitations on adjustment of state traffic is six years, all records previous to that time being destroyed, and this will be your authority to render bill against the SP&S for your proportion of switching charges on all cars moving April, 1926, and subsequent thereof.

Yours truly,
ROBT. CROSBIE—EJB." [72]

(Testimony of J. A. Johnsrud.)

Mr. Crosbie wrote to Mr. Shibell, by a subsequent letter, stating that he would only accept the corrections for the three-year period; that letter was for the purpose of correcting his letter of April 25, 1932, in which it was stated that the S. P. & S. would settle back to the statute of limitations of six years. The statute of limitations, as referred to in that letter, does not mean the legal statute of limitations but the statute of limitations under the railroad accounting officers rules. At one time the statute of limitations on adjustment of state traffic was six years but prior to 1932 it was reduced to three years, and, at the time the letter of April 25, 1932, was written, that was overlooked, and the letter of May 16th, was written when that was discovered. I do not mean to say that as between interstate shipments and state shipments that on the day the letter of April 25, 1932, was written, there was any difference in the date of settlement of the members of the Railway Accounting Officers Association, but prior to that time there had been a difference in interstate and intrastate settlements. The Railroad Accounting Officers Association rules are not covered entirely by interstate commerce commission rules. The rules of the Railroad Accounting Officers Association apply to subscribers to those rules. I do not know whether N. P. Terminal Company is a member of that association or not but the tenant lines are. The Railroad Officers Association limitation that I referred to reads as follows: [73]

(Testimony of J. A. Johnsrud.)

> "Time Limit for Adjustments—Interstate and Canadian Traffic not involving Adjustments with Shippers or Consignees. * * * Statements of differences received after the expiration of three years from the close of the month from which the original settlement was made may be declined except when such statements of differences are made on correction accounts as set forth in paragraph 89"

It is true that the provision also contains this note:

> * * * These rules do not apply to adjustment of divisions in dispute between freight traffic departments, to retroactive divisions, to settlements with the Government, or to divisions of Federal or State Commissions".

The S. P. & S. settled only for a period of three years on account of the rules contained in the railway accounting officers association, although we did not inquire as to whether the Terminal Company was a member of such association or had subscribed to those rules. In other words, if the Terminal Company had not been a member of the association the S. P. & S. would not have permitted them to adjust back for a period of six years because the stockholders of the Northern Pacific Terminal Company, or the tenant lines, were members of the association, and we insisted upon the Terminal Company abiding by the rules of that association, even

(Testimony of J. A. Johnsrud.)

though it be not a member, and had not subscribed or agreed to be subject to the rules. In my opinion the railway accounting officers association rules apply to all accounts between two carriers that are signatories to the rules. It is a fact that the claim of the S. P. & S. in this case covers shipments for a period of four and one half years prior to the filing of the complaint. The opinion in connection with the division of switching rates on company material going to the Portland Electric Company, composed of a letter from R. W. Pickard to Carey & Kerr, [74] dated November 24, 1926, and the second letter from Carey & Kerr to R. W. Pickard, dated November 30, 1926, were offered in evidence, and received without objection, marked as defendant's Exhibit "G", and were as follows:

"November 24, 1926.

Messrs. Carey & Kerr, Attys.
Yeon Building,
Portland, Oregon
Dear Sir:—

There is attached a copy of Henry's tariff No. 6-C which names switching rates between points in the Portland Switching Terminals:

We have oil storage tanks located in what is known as the Linnton and Willbridge district, said district being included in Zone 5 as described in item 70 of the tariff.

The P. E. P. Co. is a user of fuel oil and their storage tanks are located in East Port-

(Testimony of J. A. Johnsrud.)

land north of East Mill Street known in the same item of the tariff as Zone 8.

In item 75 of the tariff it will be noted there is a rate provided on traffic between zone 5 and 8 of $16.50 per car. The divisions governing the rates as agreed upon between the various lines are that they will divide equally as between the number of lines handling. A copy of the division sheet is also attached.

There are shipments of fuel oil moving from Linnton and Willbridge in zone 5 to the P. E. P. Co. in Zone 8. This fuel oil, however, is interchanged to the P. E. P. at our interchange track which is located in zone two and the switching rates from zone 5 to 2 is $14.00 per car. It has been our contention that on company fuel oil for the P. E. P. when we deliver the car to that line at our interchange with them in zone 2 the movement is complete because the shipment is given to them. They on the other hand contend that the shipment has not reached its destination until it is finally spotted at their storage warehouse in zone 8. If our contention is correct we would take the entire amount of zone 5 to zone 2 of $14.00 per car. If, on the other hand, the P. E. P. Co.'s. contention is correct; that is, that the shipment is subject to zone 5 to zone 8 rate and they out of that, for their handling from our interchange track to their storage warehouse, get 50% as

(Testimony of J. A. Johnsrud.)

per the division sheet [75] then the rate and divisions would be as follows: Zone 5 to zone 8 $16.50 of which the P. E. P. Co. would be entitled to $8.25, or 50%.

They contend under the Commission's Conference Ruling No. 225 that the rate to be charged against them is the rate we would charge to John Jones, for example, and while that is true it seems to me that our reimbursing them with 50% of the revenue would not result in them paying as much freight charges as John Jones for the reason that they would, through the medium of the division sheet, get 50% of it back.

Again there is a grave question as to whether under Conference Ruling 225 they are not entitled to have the shipment billed from zone 5 to their warehouse in zone 8, even though it is their own traffic, and participate in the division where that would give them a net transportation cost less than the zone 5 to zone 2 rate of which we keep all.

I would like your ruling on this for the reason that there are other movements of the same character involved, such as fuel oil from Willbridge to S. P. Brooklyn storage tanks located in zone 4 and from Willbridge to the N. P. Terminal storage tanks in Guilds Lake which is within the same zone; namely, 2, and whatever the ruling is in connection with the P. E. P.

(Testimony of J. A. Johnsrud.)

situation will likewise apply to the other traffic.

Briefly summed up it seems to be a question of whether or not the other companies at Portland are entitled to a divisional cut out of the switching revenue accruing on their own fuel oil.

Your truly,

R. W. PICKARD

EB:FH General Freight Agent".

"Portland, Oregon
November 30, 1926

Mr. R. W. Pickard, General Freight Agent,
Spokane, Portland and Seattle Railway
Company,
Portland, Oregon

We have your letter of the 24th instant enclosing copies of tariff stating Portland switching rates, which copies we return herewith.

It seems to us that the Portland Electric Power Company is right in this dispute and that the situation can be corrected only by a different arrangement [76] for divisions. The tap line division cases established the right of an industry to own a common carrier line which, if it was in truth a common carrier line, could legally share in the through rate. The Portland Company is in much the same situation as one of these industries owning a tap line. It can have its shipments consigned to

(Testimony of J. A. Johnsrud.)

their actual destination and participate in the division of the freight charge.

Ordinarily it is to the interest of a carrier which is also the consignee of a shipment, to fix the first junction point with the connecting carrier as the bill of lading destination so as to avoid the imposition of commercial freight rates for the full haul. In this case the advantage is the other way but we see no way of compelling the Portland Company to bill the shipment to the point of connection instead of its actual destination.

CAH:GK

Enclosures

CAREY & KERR"

I am familiar with the settlement made in connection with the oil shipments consigned to the Northern Pacific Railway Company from Sunset Pacific Oil Company, and the copies of shipping orders, which I have show that such shipments were consigned to the N. P. Terminal Company, Oil Spur, the shipping orders being dated March 10, 1934. A copy of a letter from Mr. Crosbie to Mr. Shibell, dated March 1, 1933, inclosing a copy of a bill of lading, dated February 22, 1933, was offered and received in evidence, without objection, and marked defendant's Exhibit "H". The bill of lading read: "Consigned to Northern Pacific Railway Company, Portland, Oregon. Route S. P. & S."

(Testimony of J. A. Johnsrud.)

"March 1st, 1933

Mr. C. B. Shibell, Comptroller,
Northern Pacific Terminal Company,
Portland, Oregon.

Switching N. P. Ry Co. Fuel Oil Cars

Dear Sir:

Commencing with January, 1933, there has been a movement of fuel oil from the Sunset Pacific Oil Company at Linnton, Oregon, to the Northern Pacific Railway Company, Portland, Oregon, on which we have been assessed the Zone switch rate of $8.55 per car, applying between industries within Zone 5. [77]

The attached bill of lading covers the movement of these cars on February 22nd, 1933, and you will note that they are billed directly to the Northern Pacific Railway Company at Portland, Oregon, no particular track being designated.

It is our understanding, however, that these cars are being unloaded at Guilds Lake Yard, and that the entire movement is within Zone 5. Will you kindly confirm this understanding and oblige.

Yours truly,
Robert Crosbie".

Mr. Hart: You will agree, of course, Mr. Wilson, that the Northern Pacific Railway Company is not able to participate in that movement, and that the Terminal Company had to do it. Is that correct?

(Testimony of J. A. Johnsrud.)

Mr. Wilson: I agree that the Northern Pacific Terminal Company participated in that movement, and that it made no difference in this particular case whether the thing was consigned to Portland, Oregon, whether the billing consigned it to Portland, Oregon, or whether it consigned it to Guilds Lake, or whether it consigned it to Oil Spur, Guilds Lake. The billing made no difference in this case, and they paid us our proportion of the switching charge, notwithstanding their claim."

The Northern Pacific Railway Company made a switching settlement between the carriers for the shipment shown in the bill of lading, defendant's Exhibit "H", and paid to the S. P. & S. fifty per cent of the switching charge in such settlement, and what settlement was made between the Northern Pacific Railway Company and the Northern Pacific Terminal Company, I do not know. It was made direct between the Northern Pacific Railway Company and the Northern Pacific Terminal Company. The shipment was delivered at the oil tank at the roundhouse at Guilds Lake.

Mr. HART: I don't see that you need take time on that. I am perfectly willing to concede that any shipment made to an outside consignee, like the Northern Pacific Railway, the Pullman Company, or any one else, the Terminal Company having participated in the

(Testimony of J. A. Johnsrud.)

switching movement, it was entitled to fifty per cent of the switching revenue.

Mr. WILSON: That covers that point exactly. Do you also concede, in view of this correspondence, that this oil was put in the oil tank at the oil spur at the round- [78] house at Guilds Lake.

Mr. HART: Wherever the Northern Pacific Railway Company wanted it put. They were the consignee.

COURT: You are willing to concede they put it any place they desired?

Mr. HART: Yes, the billing is everything, and when the consignee also claims to be the carrier the billing is everything.

The shipments of fuel oil to the Northern Pacific Terminal Company from any point within the switching limits on the S. P. & S. line ceased on March 28, 1932, and, in fact, the question of dividing the switching revenue on the earlier shipments to the N. P. Terminal Company did not come up until one year after the Terminal Company had ceased shipping from the oil companies located on the line of the S. P. & S. and originated by Mr. Crosbie's letter to Mr. Shibell, dated March 27, 1933, that is, one year after the shipments from the Richfield Oil Company ceased.

On all shipments at originated from the Richfield Oil Company, which shipments commenced on January 6, 1930, the Terminal Company paid the

(Testimony of J. A. Johnsrud.)

freight and was allowed to retain fifty per cent of the switching charge.

On the shipments from the Standard Oil Company, which were prepaid, the S. P. & S. agent collected the money, the S. P. & S. had the money and refused to give any of it to the Terminal Company.

On shipments from the Richfield Oil Company the shipments were not prepaid, the Terminal Company paid the freight and retained one half the charge.

Plaintiff thereupon rested. [79]

B. E. PALMER

called as a witness on behalf of the defendant, testified as follows:

I am manager of the N. P. Terminal Company of Oregon, and have been such since 1920. The interchange of cars from the S. P. & S. to the Terminal Company was established at Guilds Lake in approximately the year 1922. In establishing an interchange between these carriers, each carrier provides or designates a track as an interchange track. The S. P. & S. designated the tracks adjacent to the Admiral Dock as the interchange tracks on which it would receive business from the N. P. Terminal Company. The Northern Pacific Terminal Company designated as its interchange track any

(Testimony of B. E. Palmer.)

open freight track at the Guilds Lake make-up and break-up yard on which it would receive business from the S. P. & S. In making the interchange the S. P. & S. comes in on this switch, cut off their cars, and their engine would go on light, or, if they happen to have other cars go on with such other cars. The Terminal Company could have designated any other track for interchange purposes. It could have designated a track outside of Guilds Lake, it was its privilege to designate any track it chose. The S. P. & S. did not spot the cars in interchange at any place, it pulled in on a freight track and left the cars on the freight track. They could leave them on any vacant track. There were six tracks there and the freight yard is about three quarters of a mile long. These tracks do not extend the whole distance, in the middle longitudinally is a complete break between the tracks, except the two outside tracks. These tracks have previously been designated as the make up and break up yard. [80]

There are no facilities in that yard for unloading oil. The S. P. & S. makes two or three interchanges daily, and the Terminal Company cars are not segregated at the interchange by the S. P. & S. The average daily interchange from S. P. & S. is about forty to fifty cars; in the busy season it reaches as high as seventy cars. The Terminal Company had to perform a service with each car left at the interchange. Some cars might be for the Southern Pacific interchange, some for the Union Pacific, and some

(Testimony of B. E. Palmer.)

for the Terminal Company. All of these cars would have to be switched out. The Terminal Company cars were moved to the oil tracks. Union Pacific and S. P. & S. were moved to the interchange tracks at the Union Station. We had to pick out from the entire interchange the cars that were consigned to the Terminal Company. The cars consigned to the Terminal Company were moved to the oil spur for unloading, which is at least a half mile from the interchange track. If the cars were left at about the middle of the interchange tracks the Terminal Company would have to pick up the cars with one of its switching engines, moved it up there then backed it in on the track where the oil tank is located. This was entirely Terminal Company service, with its own power throughout, as the Terminal Company is the only one that is authorized to do any work within the Guilds Lake yard. At the oil spur there is located a sump into which the oil is emptied from the car and then pumped up into the tank, which is the at a higher elevation. From the tank it flows by gravity into the locomotive tank. Only one car can be unloaded at a time, and each car has to be spotted over the sump when unloaded. The oil storage tank holds approximately five carloads. [81]

In making an interchange the car to be interchanged is delivered on the interchange track, it is then inspected to see that it would pass the interstate Commerce rules of safety, defects, and in oil,

(Testimony of B. E. Palmer.)

gasoline and that sort, particularly, as to any leakage. After it is inspected and accepted, then the receiving road assumes full responsibility for the car.

A per diem is a charge made by one railroad to another for the use of the car. It is a fixed charge of $1.50 a car a day. The shipper pays no per diem. The shipper is charged demurrage if he holds the car longer than the free time allowed by the demurrage rules. The shipper is allowed twenty-four hours to unload the car and after that is charged a demurrage charge for longer detention of the car. The fuel oil shipments involved here, consigned to the Terminal Company, were interchanged with the Terminal Company. With reference to the per diem, switching roads are allowed four days reclaim under the rules, that is, four days in which to return the car without being charged a per diem for use thereof but are not charged on the basis of the demurrage rules. The only notice given to the Terminal Company on the arrival of the car on the interchange was the receipt of the way-bill. In notifying a shipper that his car is spotted they usually go beyond that by advance notices of when it will arrive and they keep the shipper informed as to the car's movement when it arrives in the yard, and the approximate time it will be placed at its place of business. I think there was no difference between the billing that was handed to the Terminal Company in connection with

(Testimony of B. E. Palmer.)

these cars, and the billing handed the Terminal Company with reference to any other car interchanged to the Terminal Company for further carriage.

When the cars were unloaded at the oil sump the Terminal Company would be required to return the empties to the S. P. & S. at their designated interchange track at the Admiral Dock [82] about a mile away. At this point the Admiral Dock was located on the map, plaintiff's Exhibit 1, as being No. 43, being in close proximity to Terminal No. 1. When a car is delivered to a shipper, and the industry is located on the Terminal Company tracks, it would be necessary to interchange to the Terminal Company, and the Terminal Company would make the physical delivery of the car. If the industry was located on the S. P. & S. track it would be reversed —the Terminal Company would interchange to the S. P. & S. and the S. P. & S. would complete the delivery. When the Terminal Company delivers a shipment to a shipper we do not expect the shipper to transport the car from the place where we leave it to the place where he wants it unloaded. The rate contemplates a delivery to the industrial track of the shipper. In the case of a shipment consigned to a consignee at Portland, Oregon, we always take the means to find out where the consignee wants it to be delivered. I do not agree that all the directions are taken from the consignor without paying attention to the directions of the consignee. The

(Testimony of B. E. Palmer.)

billing really has no bearing on interchange or final delivery. The billing is merely a direction. The billing might say Chicago to Portland but that does not complete the transaction and after it reaches Portland we would endeavor to ascertain the desired destination or delivery point. After finding out the delivery point we would take the car to the place for that is part of the service.

The Terminal tariff is a switching tariff covering the movement from one industry within the terminal limits to another industry within the terminal limits and providing rates covering such service. [83]

The shipments involved in this case, from points on the S. P. & S., around Linnton, consigned to the Northern Pacific Railway Company, at Portland, Oregon, is brought in with the general interchange from the S. P. & S. It is interchanged at Guilds Lake at one of the designated interchange tracks. From there it would be switched out and handled by the Terminal Company to wherever the Northern Pacific wanted it. The fuel oil that the Northern Pacific Railway has used in its locomotives and which has been moving since January, 1933, goes over to the same oil track, goes into the same sump and into the same tank as that of the Terminal Company.

The Northern Pacific Railway engines are hostled down there at the roundhouse in Guilds Lake, and as the oil is taken out to fill the locomotive tanks

(Testimony of B. E. Palmer.)

of the Northern Pacific engines it is taken out indiscriminately from the tank and the amount furnished the Northern Pacific Railway's engines is charged to that company. The haul on the Northern Pacific Railway Company oil and the Terminal Company oil is practically identical except that the Terminal Company oil is hauling for itself and the Northern Pacific Railway Company's oil is hauled by the Terminal Company.

In accounting on the hauling of the Northern Pacific Railway Company oil for moving it from the interchange track to the oil spur the Northern Pacific Railway Company pays its proportion of the Terminal Company's operating cost as the total number of cars handled for that company bears to the total cars handled by the Terminal Company.

Referring to defendant's Exhibit "I" the Guilds Lake district and Guilds Lake yard is one thing. It consists of the switching tracks within the territory bounded by the [84] tracks upon which freight is received and switched. The make up and break up yard, the roundhouse, the tracks leading to it, the passenger yard to which all passenger cars are taken; also the repair shop, and the storage equipment, which I described as the passenger yard, and includes the whole railroad development down there in that district and covers an area of a little more than one hundred acres. The Guilds Lake district includes that and also certain industry tracks leading off from it. The development is shown on

(Testimony of B. E. Palmer.)

defendant's Exhibit "I". The word "Guilds Lake" is used interchangeably for the terminal, for the yard, and for the whole development.

It is also conceded by plaintiff's attorney that the S. P. & S. could not make delivery of the oil at the roundhouse; that to make such delivery it would be required to interchange the cars with the Terminal Company; that to make such delivery the S. P. & S. were compelled to transfer the cars to the Terminal Company.

CROSS EXAMINATION

By interchange I mean to say that one railroad turns a car over to another railroad to complete the transportation, that is called for by the bill of lading. A delivery to a shipper means that the last railroad that participates in the movement spots the car at the shipper's place of delivery. A delivery to a consignee, who happens to be a railroad company, is not necessarily any different than a delivery to an ordinary commercial shipper if it is to be delivered at a designated track. If it is to be delivered at a designated track on the connecting railroad's line the connecting railroad participates in the transportation. If you assume that a connecting railroad wants to take delivery at the point of interchange then it gets delivery just the same as it would an interchange. In these shipments that we have been [85] discussing that were billed to the Terminal Company at Guilds Lake, if the Terminal Company wanted these shipments to go on to the

(Testimony of B. E. Palmer.)

Union Depot, or wanted a shipment to go to the Union Depot for the use in the Depot building, the Terminal Company would have the billing reading from Willbridge to the Union Depot if it wanted to. In case the Terminal Company wanted a car of oil delivered to the Union Depot they could have it billed to the Union Depot and the rate between those two zones would apply, and in the case when the Terminal Company got the car at Guilds Lake that would be an interchange between the two connecting carriers, even though the Terminal Company is also the consignee.

"Q. But if the Terminal Company decided that it wanted to take delivery of that car at Guilds Lake, if they figured it would be a little cheaper, they could do so, and they they could handle it in to the Union Depot with their own engine, in any way they liked, and then that would not be a part of transportation covered by the tariff, would it?

A. If they decided that, that is true.

Q. Yes.

COURT: In that event, no division of the rate would be made?

A. But I would consider that that would be a matter of decision.

COURT: It would be a matter in the option of the Terminal Company?

A. There should be some—there should be a decision of that effect made, and it should be clearly understood.

(Testimony of B. E. Palmer.)

Mr. HART: Yes. Now, if I may stop and explain to your Honor, we take the position that that sort of decision has to be made in advance of the shipment, and could not be made later.

Q. Mr. Palmer, say that a carrier like the Northern Pacific Terminal Company taking cars from the S. P. & S. cars of oil that are actually consigned to the Terminal Company, the Terminal Company in that situation can either take those cars as a consignee right there at that interchange, or they can take them as a connecting carrier for further transportation?

A. In answering that, I would have to assume that the Terminal Company was a party to this billing. Now, the Terminal Company had nothing to do with the billing. [86] The bills were made by the S. P. & S. Railroad. Now, the Terminal Company didn't know where they consigned it. There is no such agreement in existence.

COURT: Who directs how the bill of lading shall be made?

A. I just stated—

COURT: Is that the shipper, or consignee, or the carrier?

A. The shipper—I don't know—it was the originating carrier that makes the bills.

(Testimony of B. E. Palmer.)

The shipper does not make the bills. In this particular transaction I know that the bills of lading were made out on the forms of the shipper. The bill of lading is merely a direction of a movement of the car say from Seattle to Portland. The shipper or consignor has no right to say where that car shall be placed. Now if it was a car that was handled from say the Northern Pacific or the Union Pacific from Seattle, the final destination was on an industrial track on the S. P. & S. Railroad, the car would be brought to the west side of the river, interchanged to the S. P. & S. Railroad, and they would handle it to destination.

It is true that the Terminal Company has a right to take delivery at the first connecting point or instead it might provide for delivery at the final destination, and when possession changes at the interchange track of shipments belonging and actually consigned to the second carrier has the right to make that change of possession either an interchange or an actual delivery, I am now speaking of rights.

RE-DIRECT EXAMINATION

The Terminal Company never sold any of its oil to the Southern Pacific, or to any other person. They could not do that under their contract of purchase of the oil. *The* [87]

The Terminal Company never elected to receive delivery, or notify the S. P. & S. that it elected to receive delivery, of this oil at the interchange track.

(Testimony of B. E. Palmer.)

Its only notification to the S. P. & S. of receiving business at that track was its designation of the track as a receiving track for the interchange of business from the S. P. & S. That is, a general designation of that track as the receiving track for interchange business. If the interchange track, designated by the Terminal Company for interchange business, had been outside of Guilds Lake and the bill of lading read exactly as it is framed in these cases, the shipments could not have been put, by the S. P. & S. on the track at Guilds Lake, because they had no rights in Guilds Lake track at, and their only right there is to put cars there for delivery in interchange.

RECROSS EXAMINATION

When the Terminal Company took possession of these shipments that were billed to the Terminal Company at Guilds Lake at the interchange track the Terminal Company had complete and absolute control over them and was responsible for them under the car service rules, and if we wanted to send that car anywhere we liked we could do it without accounting to the S. P. & S. We could not have sold any one of those cars to any body else on account of our contract with the oil company, and we would not have had the legal right to have sold it to somebody else. The S. P. & S. had nothing to do with those contracts of purchase and we would have no legal right to use any oil except for the

(Testimony of B. E. Palmer.)

purpose we bought it for because of our contract of purchase.

The oil was consigned for a definite purpose, and that was for use in the Northern Pacific Terminal Company's engines. There was nothing in the bill of lading to show that. If we [88] had bought the oil for the purpose of speculating it is possible that instead of taking it to the sump we could have taken it up to the Admiral Dock, or any place else and drained it into another car if we had wanted to.

Is is thereupon stipulated that the contract of purchase of the fuel oil between the Northern Pacific Terminal Company and the Standard Oil Company, covering a period from February 1, 1923, to January 6, 1930, covering the oil involved in this case provided that the oil was sold by the Standard Oil Company to the Northern Pacific Terminal Company, f.o.b. Fuel Oil Spur, Guilds Lake, Portland, within switching Zone 5, and that the roundhouse is in Zone 5.

C. B. SHIBELL

was called as a witness on behalf of the defendant and testified as follows:

I have been comptroller of Northern Pacific Terminal Company since 1927. I have been employed in the office of the comptroller since 1915. During that period I was in charge of the accounts of the Terminal Company. I had some correspondence with

(Testimony of C. B. Shibell.)

the comptroller of the S. P. & S. with reference to the claim of the Terminal Company that it was entitled to a part of the revenue accruing on oil shipments on lines of the S. P. & S. to the Terminal Company, and consigned to the Terminal Company. I took the matter up first in 1926. The accounting department handled the matter very poorly in not having taken it up earlier. [89]

During the period from 1923 and ending December 31, 1929, the Standard Oil Company was paying the freight charges to the S. P. & S. In our accounting the originating carrier reports the freight charges and when the freight is prepaid collects the money and it was the responsibility of the S. P. & S. to make the accounting to the Terminal Company. The S. P. & S. made the switching settlement statements showing the retention of all the revenue and in 1926 the Terminal Company called the attention of the S. P. & S. to the fact that it was not giving the Terminal Company what they were entitled to, and that it was our opinion that the Terminal Company should participate in the division of the revenue.

The answer to our letter was Mr. Pickard's letter in which he said it would be a form of rebating if the S. P. & S. divided the switching revenue. These letters are already in evidence.

Thereupon there was offered and received in evidence as defendant's Exhibit "J", a letter of C. B. Shibell, Comptroller of the N. P. Terminal Com-

(Testimony of C. B. Shibell.)

pany, to S. F. Parr, Agent of the S. P. & S. Railway, dated March 20, 1930, the answer of Robert Crosbie, Comptroller of the S. P. & S. to C. B. Shibell, dated March 29, 1930, a letter of C. B. Shibell [90] to Robert Crosbie, Comptroller of the S. P. & S. dated April 1, 1930, and a letter of Robert Crosbie, to C. B. Shibell, dated April 18, 1930, which letters are as follows:

Portland, Oregon, March 20, 1930.

Mr. S. F. Parr, Agt.,
S. P. & S. Ry. Co.
Linnton, Oregon

Dear Sir:

Wish to call your attention to the fact that you have been billing the Northern Pacific Terminal Co. in the amount of $11.50 per car on fuel oil, the rate applicable on cars moving from Zone 5 to Zone 1.

This rate is incorrect. The N. P. Terminal Co. plant, where this fuel oil is unloaded, is located at Guilds Lake Yard in Zone 5 and the rate of $8.55, applicable to an exclusive zone 5 switch movement should be charged, with an equal division of the revenue between the N. P. T. Co. and the S. P. & S. Ry. Co.

Will you please acknowledge receipt of this letter and advise when an adjustment will be made on the freight bills which we have paid to the S. P. & S. at Linnton, where the incorrect

(Testimony of C. B. Shibell.)

rate was applied? Your assumption that our Guild's Lake plant was located in Zone 1 is incorrect. It is located in Zone 5.

Yours truly,
(Sgd) C. B. Shibell,
Comptroller.

March 29, 1930

Mr. C. B. Shibell, Comptroller
Northern Pacific Terminal Company,
Portland, Oregon

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL COMPANY

Referring to your letter of March 20th, file C 201, to agent at Linnton, in regard to charges billed you on shipments of your fuel oil to Portland where you have been billed a Zone 5 to Zone 1 charge of $11.50 per car instead of the Zone 5 rate of $8.55; [91]

It is our understanding that these shipments are billed to connection with your line at Guild's Lake and should be handled on S. P. & S. local switching settlement statements, your line not participating in the haul. Charges should, therefore, be adjusted to $8.55 per car which amount should accrue to the S. P. & S. As settlement has been made allowing your line $5.75 per car

(Testimony of C. B. Shibell.)

out of the revenue, adjustment should now be made reducing the charges to $8.55 per car which amount would accrue to the S. P. & S. making a balance in favor of the S. P. & S. of $2.80 per car.

Please advise if you will accept our bill for adjustment on this basis or do you prefer to handle thru agents account. We believe that adjustment could be expedited, with the lease inconvenience to all concerned, if handled thru audit bill instead of thru the agents' account.

(Sgd) Robt. Crosbie,
Comptroller.

April 1, 1930.

Mr. Robert Crosbie, Comptroller,
Spokane, Portland & Seattle Railway Co.
Portland, Oregon

Dear Sir:

I have your letter dated March 29, 1930, file TR 382-N, relative to accounting for revenue assessed under the Zone Tariff, on fuel oil moving from Linnton to the Northern Pacific Terminal Company.

These cars of oil are billed to the Northern Pacific Terminal Company at a rate of $8.55 per car, which covers the placement of the load at the industry, and not only to a connecting line, as stated in your letter. Terminal Com-

(Testimony of C. B. Shibell.)

pany power completes the delivery from setout track to the industry, which in this instance, is the Northern Pacific Terminal Company, fuel track, and the $8.55 in the published tariff is not earned until placement on our fuel track is made. In accordance with published tariff, the $8.55 should be divided between the carriers participating in the haul, and therefore, you should report to us 50% of the $8.55 as the line completing the delivery.

Yours truly,
Original signed by C. B. Shibell,
Comptroller.

Cc—John Miesbus,
General Yardmaster
Dict. CSB:JH [92]

April 18, 1930.

Mr. C. B. Shibell, Comptroller,
The Northern Pacific Terminal Company,
Portland, Oregon.

Dear Sir:

SWITCHING CHARGES ON FUEL OIL FOR NORTHERN PACIFIC TERMINAL CO.

Replying to your letter of April 1st, File C 141, in regard to division of switching revenue on shipments of fuel oil consigned to the Northern Pacific Terminal Company:

(Testimony of C. B. Shibell.)

If delivery of oil shipments to connections with your track does not complete the movement and the movement from such connections to unloading points involves an additional haul by the Northern Pacific Terminal Company, you will be entitled to 50% of the switching charge.

You have been charged $11.50 on a number of these shipments out of which your line has received $5.75 whereas the correct charges are $8.55 out of which your line received $4.28. This leaves an overcharge of $2.95 per car of which $1.47 is due from your line leaving a net amount due of $1.47 per car.

Please advise if you will render audit bill against us to adjust these items or do you prefer to have it handled thru the Agent's accounts by corrections on the switching settlement statements.

Yours truly,

ROBT. CROSBIE.

HS J

CROSS EXAMINATION

My predecessor was E. L. Brown, who was the comptroller of the Terminal Company for about fifty years. I do not blame Mr. Brown but rather myself as handling this matter rather poorly because I was in active charge of the accounting at

(Testimony of C. B. Shibell.)

the time. Up until 1926 we rather passed the explanation of Mr. Pickard with regard to the division of the switching revenue. The S. P. & S. having declined our demand of 1926 we did nothing about it until 1930. The movement continued from Willbridge right through until 1930 and we continued to accept the accounting of the S. P. & S. in the meantime. In 1930 we reiterated [93] our former position that we should participate in the revenue. The matter was brought up next by the Terminal Company's comptroller by letter of April 1, 1932. I recall of no voluntary division on the part of the S. P. & S. without some written request on the part of the Terminal Company.

It was stipulated that between February 1, 1923, and April 25th, 1926, there was transported in the movement involved in this case, and for which defendant claims to be entitled to one half the charge, 993 cars of oil, and that the total transportation charge therefor was the sum of $8,490.15; that from April 26, 1926, to the 31st day of December, 1929, 1309 cars on which the total transportation charge was $11,191.95, and on which there had been paid to the defendant the sum of $1,222.65; that from the 1st day of January, 1930, to the 28th day of March, 1932, there was transported 744 cars on which the total transportation charges collected was the sum of $6,436.01, and that there has been paid to the defendant the sum of $3,215.91.

Thereupon defendant rested.

Thereupon, and before the submission of said cause to said court, the defendant requested the court to make rulings on certain questions of law, which said requests, together with the ruling of the court, and the allowance of exceptions to the ruling of the court were as follows: [94]

(1) Whether or not in connection with the transportation of company material, consigned to a common carrier, where the receiving carrier and the consignee carrier have entered into joint tariffs providing rates from points on the initial carrier to points on the consignee carrier, it is as a matter of law necessary that the bill of lading shall specify the particular track upon the line of the consignee carrier at which such shipment is to be delivered where the junction point of the lines of the two carriers and the track of the consignee carrier on which said shipment is to be delivered, are both within the district as shown as the destination of said shipment and the track on which delivery was made and intended to be made at the time of the delivery of the shipment to the initial carrier cannot be reached by the line of the initial carrier, and where the initial carrier at the time of receiving the shipment had knowledge of the particular track on which said shipment was intended to be made and at which it was actually made.

The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted.

(2). Whether or not it was the duty of the initial carrier, on receiving a shipment of company material, consigned to a connecting consignee carrier, and by the joint tariffs of the two carriers the same rate applies not only to the point of junction of the two carriers, but to other points on the line of the consignee carrier at which delivery could not be made by the initial carrier to require definite instructions as to the actual track at which delivery is to be made, and insert the same in the bill of lading issued for said shipment by the initial carrier, or to require specific instructions as to the track of delivery [95] and see that proper instructions are given for such delivery where the junction point of the lines of the two carriers and the track of delivery are both within the description of the destination as actually inserted in the bill of lading issued by the initial carrier.

The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted.

(3). That the Court rule as a matter of law in this case what statute of limitations applies, towit: whether the claimed contract of limitations of three years or the state statute of six years.

The above request by defendant was overruled and denied, to which ruling of the Court the defendant excepted and its exception is allowed and noted.

In addition to the foregoing request for rulings as a matter of law the defendant calls attention to

the fact that a counterclaim has been set up by the defendant and in the reply plaintiff set up two periods of limitations, one a so-called contract limitation, and the other, the six year limitation period of the state statute, and defendant requests that testimony with reference to the character of the accounts between the plaintiff and defendant be taken so as to determine whether or not the account between the parties was not an open mutual current account, and further testimony as to whether or not either the so-called contract limitations or the state statute of limitations applies in this case.

The above request of defendant was overruled and denied, to which ruling of the Court the defendant excepted and its ex- [96] ception is allowed and noted.

The above requests by defendant for rulings on matters of law are and each of them is hereby separately denied and disallowed. To the refusal of the Court to allow each of said requests the defendant excepted and its exception was allowed as to each of such requests and is hereby noted.

(S) JOHN H. McNARY
District Judge

Thereupon, and before the submission of said cause to the court, the defendant requested of the Court the making of certain Findings of Fact and Conclusions of law, which said request, together with the rulings of the court thereon, and the exceptions to such rulings, were in words and figures as follows:

I.

That both the plaintiff and the defendant are common carriers of freight and own lines of railroad within the switching territory known as the Portland Switching District.

II.

That the tracks of said companies connect at various points within the switching district and there is a connection between said tracks at what is known as Guilds Lake.

III.

That the plaintiff has no tracks except its through running tracks at Guilds Lake, but the defendant has a large yard and plant at said point consisting of make-up and break-up yards, coach yards, supply yards, repair plant and a roundhouse and hostling plant; that the make-up and break-up yard is adjacent to the through tracks operated over by the S. P. & S. and defendant has designated a track in the make-up and break-up yard as a transfer [97] track on business received by it from the plaintiff, but said plaintiff has no right to go upon said tracks for any purpose, except to transfer business to the defendant for further transportation.

IV.

At the roundhouse is an oil tank for the storage of fuel oil owned and operated by the defendant at which point are facilities for the unloading of oil and the storage thereof.

V.

That the plaintiff has no trackage and no right to make deliveries at said roundhouse or oil storage tank or spur adjacent to such tank, and there are no facilities for the unloading of oil at the transfer track in the make-up and break-up yard at Guilds Lake; that the distance from said transfer track in the break-up yard to the oil spur adjacent to the oil storage track at Guilds Lake is approximately three-quarters of a mile to one mile.

VI.

That prior to the transportation of the shipments of oil involved in this case plaintiff and defendant, together with other carriers having tracks within the Portland Switching District entered into joint tariffs, published and filed the same with the Interstate Commerce Commission, and with the Public Utility Commission, or its successors, Public Utilities Commissioner of the State of Oregon governing switching rates applicable from points within the said Portland Switching District on the line of one of said carriers for delivery at points on the tracks of another of such carriers, and said rates were fully established and have been in effect at all times during [98] the transportation of the oil in question in this case.

VII.

That both the point of origin of the shipments involved in this case and all tracks within what is

designated as Guilds Lake or Guilds Lake District were within the same zone and the tariff so established and filed provided at all times a rate of $8.55 per car, applicable to all the shipments involved, up to the 2nd day of January, 1932, and thereafter a rate of $9.40 per car on all shipments involved, transported on and after said January 2, 1932.

VIII.

That by separate agreement between the parties to said switching tariff it was agreed that the rate applicable upon any shipments should be divided equally between the number of carriers participating in the transportation service and that when two carriers participated the revenue accruing from said shipment would be divided equally between them.

IX.

That on or about the 1st day of February, 1923, up to and including the 6th day of January, 1930, the defendant was receiving its fuel oil from the Standard Oil Company, whose oil plant is located at Willbridge on the line of the plaintiff; that the contracts for the sale of said oil provided that the oil was sold to the defendant for locomotive fuel oil purposes and was to be delivered f. o. b. in tank car lots at the oil spur of the defendant at Guilds Lake, or that it was to be delivered f. o. b. at the defendant's oil spur in Zone 5; that each and all of the shipments up to and including Jan- [99]

uary 6, 1930, consisted of oil sold to the defendant under said contracts.

X.

That all shipments involved herein subsequent to the 6th day of January, 1930, were sold to the defendant under contracts providing that the same were sold f. o. b. the seller's plant at Linnton.

XI.

That on each of said shipments involved in this case the bills of lading were entered into by and between the plaintiff and the seller of said oil and the consignee was designated as the Northern Pacific Terminal Company, Guilds Lake, or Guilds Lake, Portland, Oregon, and the routing designated in said bills of lading were "S. P. & S.—N. P. T.", which initials indicated Spokane, Portland & Seattle and the Northern Pacific Terminal Company.

XII.

That each and all of said shipments were transported by the S. P. & S. to the transfer track at the make-up and break-up yard of the defendant at Guilds Lake and were taken out of the transfer train and transported by the defendant from said transfer track to the oil spur at the oil storage tank in the vicinity of the roundhouse, which point is also in Guilds Lake.

XIII.

That the total number of cars so transported from the 1st day of February, 1923, to the 25th day

of April, 1926, was 993 cars, and the total revenue collected was $8,490.15, no part of which was paid to the defendant. [100]

XIV.

That the total number of cars so transported from the 26th day of April, 1926, to the 31st day of December, 1929, was 1309 cars, on which there was collected a total of $11,191.95 as freight charges, no part of which was paid to the defendant, except the sum of $1,222.65.

XV.

That the total number of cars so transported from January 1, 1930, to March 28, 1932, was 744 cars, of which the transportation charges collected was $6,436.01, no part of which has been paid to the defendant, except the sum of $3,215.91.

XVI.

That at all times from and after the 26th day of August, 1926, the plaintiff has had full knowledge that each and all of said shipments were destined when shipped to the oil spur of the defendant at the storage tank in Guilds Lake. [101]

The defendant requests the Court to make the following

CONCLUSIONS OF LAW

I.

That the defendant had the right to participate in the rate charged for materials consigned to it

where the transportation service extended beyond the junction of the tracks of the plaintiff and defendant.

II.

That it was the primary duty of the plaintiff, on accepting the shipment, to see either that the bill of lading designated the proper destination or to secure sufficient information to make definite the destination to which such shipments were to be carried.

III.

That the bills of lading issued in this case were sufficient to show that the transportation service extended onto the line of the defendant.

IV.

That irrespective of the sufficiency of the bill of lading the plaintiff had at all times since August 26, 1926, knowledge of where the shipments were destined and to which they were actually transported, and any failure to designate said destination in said bill of lading, if the same was required, was its fault.

V.

That with knowledge of the actual track to which said shipments were to be delivered it was not necessary that it should [102] be specifically designated in the bill of lading.

VI.

That the defendant participated as a common carrier in each and all of said shipments and is entitled to recover one-half the amount collected by plaintiff as transportation charges and not heretofore paid.

VII.

That the defendant is entitled to recover of and from the plaintiff as its division of the switching charges paid on said shipments, the following amounts, to wit: the sum of $4,245.07 from the 1st day of February, 1923, to and including the 25th day of April, 1926, and the further sum of $4,984.65 for the period April 26, 1926 to and including the 1st day of January, 1930, and the further sum of $2.09 for the period subsequent to January 6, 1930.

VIII.

That the plaintiff is not entitled to recover any sum of and from the defendant.

IX.

That the defendant is entitled to recover its costs and disbursements incurred herein against the plaintiff.

.....

District Judge

The foregoing request for Findings of Fact and Conclusions of law was presented to this court with the request by defendant that each and all of said

Findings and Conclusions of Law be made by the Court before the submission of said cause to the Court for decision, [103]

IT IS ORDERED AND ADJUDGED that the foregoing proposed Findings of Fact I and II are hereby denied, on the ground and for the reason that the facts therein proposed to be found are covered by the Findings of Fact presented by the plaintiff and contemporaneously with this order being signed.

IT IS FURTHER ORDERED AND ADJUDGED, that the foregoing proposed Findings of Fact requested by defendant, numbered III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI, be and each of said Findings is separately denied and disallowed, to which denial and refusal to so find, and to each thereof, the defendant excepted, and said exceptions, and an exception to each of said refusal to so find is hereby allowed and noted by the Court.

IT IS FURTHER ORDERED and ADJUDGED that the foregoing Conclusions of law requested by defendant, numbered I, II, III, IV, V, VI, VII, VIII and IX be and each thereof is hereby denied and disallowed, and to the refusal of the Court to make each of said Conclusions so requested by the defendant separately and to each such request the defendant excepted and the Court allowed an exception to the defendant as to each of

such Conclusions so requested and said exceptions and each thereof are hereby noted.

(S) JOHN H. McNARY
District Judge [104]

Thereupon, and before the submission of said cause, the defendant requested of the court, and moved for a judgment in favor of the defendant, which judgment, so requested in favor of the defendant, and the ruling of the court, and the exception thereto, is in words and figures as follows:

The above entitled action, having been duly tried, and Findings of Fact and Conclusions of Law having been duly made and entered, determining that the plaintiff is not entitled to judgment against the defendant in any sum whatever, but that defendant is entitled on its counterclaim to judgment against the plaintiff in the sum of $4,245.07 on all shipments from the 1st day of January, 1923, to and including the 25th day of April, 1926, and the further sum of $4,984.65 for all shipments from and inclusive of April 26, 1926, to and including the 1st day of January, 1930, and the further sum of $2.09 for the period subsequent to January 6, 1930,

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant have and recover of and from plaintiff the sum of $4,245.07, together with interest thereon at the rate of six per cent per annum from the 25th day of April, 1926, and the further sum of $4,984.65, together with interest thereon at the rate of six per cent per annum from

the 1st day of January, 1930, and the further sum of $2.09 with interest thereon at the rate of six per cent per annum from March 2, 1932, and that the defendant have and recover of [105] and for the plaintiff its costs and disbursements incurred herein, taxed and allowed in the sum of $.....

Dated this ..... day of October, 1934.

.....

District Judge

Judgment in favor of the defendant in words and figures as above set out was, prior to the submission of said cause, presented to said Court, and a motion submitted by the defendant that the said judgment in said terms be granted,

IT IS HEREBY ORDERED AND ADJUDGED that said request and said motion be and the same are hereby denied, to the refusal to allow said request and said motion the defendant excepted and its exception was and is hereby allowed and noted.

JOHN H. McNARY
District Judge.

That prior to the submission of said cause the plaintiff requested Findings of Fact and Conclusions of Law and Judgment in its favor, which said Findings of Fact and Conclusions of Law and Judgment are in words as finally allowed and signed by the court and as contained in the transcript to be filed herein. Before the allowance and the signing thereof the defendant submitted to the Court

objections to said proposed Findings of Fact and Conclusions of Law, which said objections and the ruling of the Court thereon, and the exceptions allowed, are in words and figures as follows: [106]

I.

Defendant objects to plaintiff's requested Finding of Fact III, and particularly that portion which reads, "all of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipment and at Guilds Lake were delivered to defendant," on the ground and for the reason that the same is not supported by the evidence, that the undisputed evidence conclusively shows that plaintiff had no right to make deliveries of shipments at Guilds Lake or to go upon the tracks of defendant at said point, except for the purpose of making transfers of shipments to the defendant for further transportation to final destination of said shipments; and on the further ground that the bills of lading show, by naming the defendant as one of the carriers over whose lines said shipments were to be routed, that said defendant was to participate in the common carrier service in transporting said shipments to the destination thereof; on the further ground that the undisputed evidence shows that plaintiff at all times knew, and particularly from and after August 26, 1926, knew that each and all of said shipments were destined to and were in fact transported to and delivered at the oil spur

adjacent to the oil storage tank in the neighborhood of the roundhouse of defendant at Guilds Lake, and approximately three-quarters to one mile from the point where plaintiff claims to have delivered said shipments to defendant; and on the further ground that the undisputed evidence conclusively shows that at the time of the receipt of said shipments by plaintiff the same were intended to be and known by the plaintiff to be intended for transportation to said oil spur at said oil storage tank in Guilds Lake, and were in fact so transported by defendant to said oil spur. [107]

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

II.

Defendant objects to plaintiff's requested Finding of Fact V, and particularly that portion which reads, "all of said carload shipments of fuel oil were duly transported by plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipment and at Guilds Lake were delivered to defendant," on the ground and for the reason that the same is not supported by the evidence, that the undisputed evidence conclusively shows that plaintiff had no right to make deliveries of shipments at Guilds Lake or to go upon the tracks of defendant at said point, except for the purpose of making transfers of shipments to the defendant for further transportation to final destination of said ship-

ments; and on the further ground that the bills of lading show, by naming the defendant as one of the carriers over whose lines said shipments were to be routed, that said defendant was to participate in the common carrier service in transporting said shipments to the destination thereof; on the further ground that the undisputed evidence show that plaintiff at all times knew, and particularly from and after August 26, 1926, knew that each and all of said shipments were destined to and were in fact transported to and delivered at the oil spur adjacent to the oil storage tank in the neighborhood of the roundhouse of defendant at Guilds Lake, and approximately three-quarters to one mile from the point where the plaintiff claims to have delivered said shipments to defendant; and on the further ground that the undisputed evidence conclusively shows that at the time of the receipt of said shipments by plaintiff the same were intended to be and known by the plaintiff to be intended for transportation to said oil spur at said oil storage tank in Guilds [108] Lake, and were in fact so transported by defendant to said oil spur.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

III.

Defendant objects to plaintiff's requested Finding of Fact VII, and particularly that portion which reads, "all of said carload shipments of fuel

oil were duly transported by plaintiff to Guilds Lake in accordance with bills of lading issued to cover said shipment and at Guilds Lake were delivered to defendant", on the ground and for the reason that the same is not supported by the evidence, that the undisputed evidence conclusively shows that plaintiff had no right to make deliveries of shipments at Guilds Lake or to go upon the tracks of defendant at said point, except for the purpose of making transfers of shipments to the defendant for further transportation to final destination of said shipments; and on the further ground that the bills of lading show, by naming the defendant as one of the carriers over whose lines said shipments were to be routed, that said defendant was to participate in the common carrier service in transporting said shipments to the destination thereof; on the further ground that the undisputed evidence shows that plaintiff at all times knew, and particularly from and after August 26, 1926, knew that each and all of said shipments were destined to and were in fact transported to and delivered at the oil spur adjacent to the oil storage tank in the neighborhood of the roundhouse of defendant at Guilds Lake, and approximately three-quarters to one mile from the point where plaintiff claims to have delivered said shipments to defendant; and on the further ground that the undisputed evidence conclusively shows that at the time of the receipt of said shipments by plaintiff the same [109] were intended to be and known by the

plaintiff to be intended for transportation to said oil spur at said oil storage tank in Guilds Lake, and were in fact so transported by defendant to said oil spur.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

IV.

Defendant objects to Finding of Fact IX requested by plaintiff, on the ground that it is not supported by the evidence and that the undisputed evidence conclusively shows that defendant performed part of the transportation service in accomplishing the carriage of said shipments to their destination and that plaintiff was entitled only to a division of one-half of the transportation charge for said shipments instead of the whole thereof as claimed in said requested finding.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

V.

Defendant objects to Finding of Fact X requested by the plaintiff on the ground and for the reason that it is not supported by the evidence in that the undisputed evidence conclusively shows that defendant was a participating carrier in the transportation of each and all of said shipments, and that defendant was entitled to one-half the trans-

portation charge on said shipments, and that plaintiff made no error or mistake in the allowance and payment to defendant of one-half said charge on said shipments on which defendant received or retained one-half of said charge and that plaintiff is not entitled to said [110] sum of $4,440.22, or any sum whatever, but that defendant is entitled to one-half of the charge on all shipments theretofore made on which one-half the charge has not been paid by plaintiff to defendant.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

VI.

Defendant objects to the Conclusion of Law requested by plaintiff on the ground that the same is not supported by the evidence and that the undisputed evidence conclusively shows that there is no sum due from defendant to plaintiff, but that plaintiff is indebted to defendant for large sums, to wit: one-half of all transportation charges on shipments of said fuel oil heretofore made and not heretofore paid by plaintiff to defendant.

The above objection was overruled and denied by the Court, to which action of the Court defendant excepted and its exception allowed by the Court.

WILSON & REILLY
Attorneys for Defendant [111]

The above entitled objections to the proposed Findings requested by plaintiff were made prior to

the submission of said cause to the Court, and the same and each thereof, is separately overruled and denied, to which ruling of the Court, with reference to each of said objections, the defendant excepted separately and its exceptions was in each instance allowed and is hereby allowed by the Court, and said exceptions are each hereby noted.

(S) JOHN H. McNARY
District Judge

Thereafter the Court signed the Findings of Fact and Conclusions of Law requested by the plaintiff and entered judgment thereon in favor of the plaintiff and against the defendant in words and figures as requested by the plaintiff. [112]

The foregoing Bill of Exceptions having been presented to the court on the 22nd day of November, 1934, within the time allowed by order of the court herein to present the same, and the time of objecting thereto having expired, and no objections having been filed thereto, the said Bill of Exceptions is hereby settled and certified to contain a full, true and correct record of all of the evidence and exhibits offered and received in the trial of said cause, except Plaintiff's Exhibit "1" and Defendant's Exhibit "I", which said Exhibits are attached to this Bill of Exceptions and identified and made a part of this Bill of Exceptions.

I further certify that said Bill of Exceptions contains all of the Defendant's Requests for Rulings on Matters of Law, Defendant's Request for

Findings of Fact and Conclusions of Law, Defendant's Objections to the Findings of Fact and Conclusions of Law and Judgment requested by plaintiff, together with the Rulings of the Court thereon, and the exceptions of the Defendant to the Rulings of the Court on said Requests and the Findings of Fact and Conclusions and Judgment entered in said cause.

Done and dated this 11th day of December, 1934.

JOHN H. McNARY
Judge of the District Court of the United States for the District of Oregon.

[Endorsed]: Filed December 11, 1934. [113]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, a PETITION FOR APPEAL, in words and figures as follows, to wit: [114]

[Title of Court and Cause.]

PETITION FOR APPEAL

Petitioner, The Northern Pacific Terminal Company of Oregon, a corporation, defendant herein, conceiving itself aggrieved by the judgment made and entered on the 30th day of October, 1934, in the above entitled Court and cause, wherein it was adjudged that the Spokane, Portland and Seattle Railway Company, a corporation, plaintiff above named, have and recover judgment against The

Northern Pacific Terminal Company, a corporation, defendant above named, in the sum of $4,440.22, together with interest at the rate of 6% per annum from April 26, 1932, amounting to the sum of $635.20, and with costs and disbursements taxed therein in the sum of $26.00, does hereby appeal from said judgment, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and petitioner files herewith its Assignment of Errors asserted and relied upon by it upon its said appeal; said petitioner prays that its said appeal may be allowed, that citation issue herein as provided by law, and that an order be entered herein fixing the amount of the bond to be given by petitioner upon such appeal, the same to act both as a cost bond and as a supersedeas, and that a transcript of the [115] record, proceedings and papers upon which said judgment was made and entered, be duly authenticated and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

By JAMES G. WILSON
JOHN F. REILLY
Its Attorneys.

Due service of the foregoing Petition for Appeal and the receipt of a true copy thereof, duly certified to be such by James G. Wilson, one of the de-

fendant's attorneys, is hereby admitted at Portland, Oregon, this 15th day of January, 1935.

C. A. HART
Of Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [116]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, an ASSIGNMENT OF ERRORS in words and figures as follows, to wit: [117]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

The Northern Pacific Terminal Company of Oregon, defendant above named, complains of the final judgment made and entered in the above entitled cause, on the 30th day of October, 1934, and says that in the proceedings in said cause, and in said final judgment, manifest error has occurred to the prejudice of said defendant, of which it makes the following

ASSIGNMENT OF ERRORS

on which it will rely in the appeal from said judgment.

I.

The Court erred in overruling and denying defendant's request numbered I of request for rulings on questions of law claimed by defendant to be involved in this case.

II.

The Court erred in overruling and denying defendant's request numbered II of request for rulings on questions of law claimed to be involved in this case. [118]

III.

The Court erred in overruling and denying defendant's request numbered III of request for rulings on questions of law claimed to be involved in this case.

IV.

The Court erred in overruling and denying defendant's request that additional testimony be taken with reference to the character of accounts between the plaintiff and the defendant so as to determine whether or not the same was an open, mutual, current account and the limitation to be applied thereto.

V.

The Court erred in denying and refusing to find Finding of Fact numbered III requested by defendant as the same is sustained by the undisputed evidence received in said cause.

VI.

The Court erred in denying and refusing to find Finding of Fact numbered IV requested by defendant as the same is sustained by the undisputed evidence received in said cause.

VII.

The Court erred in denying and refusing to find Finding of Fact numbered V requested by defendant as the same is sustained by the undisputed evidence received in said cause.

VIII.

The Court erred in denying and refusing to find Finding of Fact numbered VI requested by defendant as the same is sustained by the undisputed evidence received in said cause. [119]

IX.

The Court erred in denying and refusing to find Finding of Fact numbered VII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

X.

The Court erred in denying and refusing to find Finding of Fact numbered VIII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XI.

The Court erred in denying and refusing to find Finding of Fact numbered IX requested by defendant as the same is sustained by the undisputed evidence in said cause.

XII.

The Court erred in denying and refusing to find Finding of Fact numbered X requested by de-

fendant as the same is sustained by the undisputed evidence received in said cause.

XIII.

The Court erred in denying and refusing to find Finding of Fact numbered XI requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XIV.

The Court erred in denying and refusing to find Finding of Fact numbered XII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XV.

The Court erred in denying and refusing to find [120] Finding of Fact numbered XIII requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XVI.

The Court erred in denying and refusing to find Finding of Fact numbered XIV requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XVII.

The Court erred in denying and refusing to find Finding of Fact numbered XV requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XVIII.

The Court erred in denying and refusing to find Finding of Fact numbered XVI requested by defendant as the same is sustained by the undisputed evidence received in said cause.

XIX.

The Court erred in refusing to make and find Conclusion of Law numbered I requested by the defendant.

XX.

The Court erred in refusing to make and find Conclusion of Law numbered II requested by the defendant.

XXI.

The Court erred in refusing to make and find Conclusion of Law numbered III requested by the defendant.

XXII.

The Court erred in refusing to make and find Conclusion of Law numbered IV requested by the defendant. [121]

XXIII.

The Court erred in refusing to make and find Conclusion of Law numbered V requested by the defendant.

XXIV.

The Court erred in refusing to make and find Conclusion of Law numbered VI requested by the defendant.

XXV.

The Court erred in refusing to make and find Conclusion of Law numbered VII requested by the defendant.

XXVI.

The Court erred in refusing to make and find Conclusion of Law numbered VIII requested by the defendant.

XXVII.

The Court erred in refusing to make and find Conclusion of Law numbered IX requested by the defendant.

XXVIII.

The Court erred in denying the motion and request of defendant that the Court give judgment in favor of the defendant to the effect that the plaintiff take nothing by its complaint and that the defendant have and recover of and from the plaintiff the sum of $4,245.07, together with interest thereon at the rate of 6% per annum from the 25th day of April, 1926, and the further sum of $4,984.65, together with interest thereon at the rate of 6% per annum from the 1st day of January, 1930, and the further sum of $2.09, with interest thereon at

the rate of 6% per annum from March 28, 1932, and that the defendant have and recover from the plaintiff its costs and disbursements to be fixed and allowed in said cause.

XXIX.

The Court erred in overruling and denying defendant's [122] objection to plaintiff's requested Finding of Fact numbered III and in thereafter making and finding said Findings of Fact.

XXX.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding of Fact numbered V and in thereafter making and finding said Findings of Fact.

XXXI.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding of Fact numbered VII and in thereafter making and finding said Findings of Fact.

XXXII.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding of Fact numbered IX and in thereafter making and finding said Findings of Fact.

XXXIII.

The Court erred in overruling and denying defendant's objection to plaintiff's requested Finding

of Fact numbered X and in thereafter making and finding said Findings of Fact.

XXXIV.

The Court erred in overruling and denying defendant's objection to Conclusion of Law requested by the plaintiff and in thereafter making and signing said Conclusion of Law.

XXXV.

The Court erred in giving judgment in said cause in favor of the plaintiff and against the defendant in the sum of $4,440.22, together with interest thereon at the rate of 6% per annum from the 26th day of April, 1932, amounting to the sum of $635.20, and in adjudging to the plaintiff against the defendant its costs and disbursements taxed therein in the sum of $26.00, and in giving judgment in favor of the plaintiff in [123] any sum whatever against the defendant.

XXXVI.

The Court erred in not entering judgment for the defendant against the plaintiff in accordance with the prayer of defendant's answer as contained in its counterclaim in said answer.

WHEREFORE, defendant prays that said judgment be reversed and that this cause be remanded to the District Court of the United States for the District of Oregon, with directions to enter judgment in favor of the defendant and against the plaintiff

in accordance with the prayer in the counterclaim of defendant's answer, or that the same be reversed with directions to the Court to take such further proceedings in said cause as this Court shall direct.

JAMES G. WILSON
JOHN F. REILLY
Attorneys for Defendant.

Due service of the foregoing Assignment of Errors and the receipt of a true copy thereof, duly certified to be such by James G. Wilson, one of the defendant's attorneys, is hereby admitted at Portland, Oregon, this 15th day of January, 1935.

C. A. HART
Attorney for Plaintiff.

[Endorsed]: Filed January 15, 1935. [124]

AND AFTERWARDS, to wit, on Tuesday, the 15th day of January, 1935, the same being the 58th JUDICIAL day of the Regular November TERM of said Court; present the HONORABLE John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [125]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

The defendant and appellant in the above entitled action having prayed for the allowance of an appeal in this cause to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled action by

the District Court of the United States for the District of Oregon, on the 30th day of October, 1934, and from each and every part thereof, and having presented and filed its petition for appeal, assignments of error, and prayer for reversal, pursuant to the statute and rules in such cases provided,

IT IS NOW HEREBY ORDERED that an appeal be and the same is hereby allowed from this Court to the United States Circuit Court of Appeals for the Ninth Circuit in said cause as provided by law, and

IT IS FURTHER ORDERED that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit the same to the said United States Circuit Court of Appeals for the Ninth Circuit [126] within thirty days from this date.

IT IS FURTHER ORDERED that the amount of the bond on said appeal to be given by the said defendant be and the same is hereby fixed at the sum of $7,000.00 to act both as a cost bond and as a supersedeas on such appeal.

Dated this 15th day of January, 1935.

JOHN H. McNARY
Judge of the United States District Court for the District of Oregon.

Service admitted Jan. 15, 1935.

C. A. HART
Of Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [127]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, a BOND ON APPEAL, in words and figures as follows, to wit: [128]

[Title of Court and Cause.]

BOND ON APPEAL FOR COSTS AND AS A SUPERSEDEAS

KNOW ALL MEN BY THESE PRESENTS, that The Northern Pacific Terminal Company of Oregon, an Oregon corporation, as principal, and St. Paul-Mercury Indemnity Company of St. Paul, Minnesota, a corporation, as surety, are held and firmly bound unto Spokane, Portland and Seattle Railway Company, a corporation, the above named plaintiff, in the full sum of $7,000.00 to be paid to the said Spokane, Portland and Seattle Railway Company, or its assigns, for which payment well and truly to be made we bind ourselves jointly and severally, and the successors and assigns of each of us, firmly by these presents.

The condition of this bond is such that

WHEREAS, the above named principal, The Northern Pacific Terminal Company of Oregon is prosecuting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered in the above entitled cause by the District Court of the United States for the District of Oregon, on to wit: the 30th day of October, 1934, in favor of the plaintiff and against the defendant, [129]

NOW THEREFORE, if the said The Northern Pacific Terminal Company of Oregon shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good and pay said judgment to the extent that it shall be affirmed, then the above obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the principal and surety have caused these presents to be executed by their respective officers thereunto duly authorized this 15th day of January, 1935.

[Seal] THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON.

By E. L. KING
President.

Attest: A. C. SPENCER
Secretary.

[Seal] ST. PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, MINNESOTA

By S. W. DeGRAFF
Its Attorney in Fact.

Countersigned at Portland, Oregon, this 14th day of January, 1935.

DEPOSIT INSURANCE AGENCY

HARRIETT JOHNSON
Resident Agent.

This bond is approved as to form, amount and sufficiency of surety, this 15 day of January, 1935.

JOHN H. McNARY
District Judge.

Due service of the within Bond on Appeal is admitted this 15th day of January, 1935.

C. A. HART,
Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [130]

[Title of Court and Cause.]

CITATION ON APPEAL

The President of the United States of America to Spokane, Portland and Seattle Railway Company, plaintiff above named,

GREETING:

Whereas, The Northern Pacific Terminal Company of Oregon, defendant above named, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered and entered in the District Court of the United States for the District of Oregon on the 30th day of October, 1934, in favor of plaintiff, against the defendant, and has given the security required by law, you are hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at the Courtroom

thereof, in the City of San Francisco, State of California, within thirty days from the date hereof, to show cause, if any there be, why said judgment should not be reversed and corrected and speedy judgment should not be [1] done by the parties in that behalf.

Given under by hand at Portland, Oregon, in said District of Oregon, this 15th day of January, 1935.

JOHN H. McNARY
Judge of the District Court of the United States for the District of Oregon.

Due service of the foregoing Citation on Appeal and the receipt of a true copy thereof, duly certified to be such by James G. Wilson, one of defendant's attorneys, is hereby admitted at Portland, Oregon, this 15th day of January, 1935.

C. A. HART
Attorney for Plaintiff. [2]

Due service of the within Citation on Appeal is admitted this ..... day of January, 1935

.....
Attorneys for Plaintiff

[Endorsed]: Filed Jan. 15, 1935. [3]

AND AFTERWARDS, to wit, on the 15th day of January, 1935, there was duly FILED in said Court, a PRAECIPE FOR TRANSCRIPT, in words and figures as follows, to wit: [131]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above entitled Court:

You are hereby requested to prepare and certify a transcript of record in the above entitled cause to be transmitted to and filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an order allowing an appeal in the above entitled cause, and to include in such transcript of record the following:

(1). Complaint.

(2). Answer.

(3). Reply.

(4). Stipulation waiving jury trial.

(5). Bill of Exceptions.

(6). Findings and Conclusions signed by the Court and filed October 30, 1934.

(7). Judgment.

(8). Assignment of errors.

(9). Petition for Appeal.

(10). Order allowing appeal and fixing amount of bond. [132]

(11). Citation on appeal with admission of service.

(12). This praecipe and any and all endorsements on the foregoing papers.

(13). Order keeping open term for settling Bill of Exceptions.

Dated this 15th day of January, 1935.

JAMES G. WILSON
JOHN F. REILLY
Attorneys for Defendant-Appellant.

Due service of the within Praecipe is admitted this 15th day of Jan. 1935.

C. A. HART
Attorneys for Plaintiff.

[Endorsed]: Filed January 15, 1935. [133]

AND AFTERWARDS, to wit, on Friday, the 8th day of February, 1935, the same being the 79th JUDICIAL day of the Regular November, 1934, TERM of said Court; present the HONORABLE John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [134]

[Title of Court and Cause.]

ORDER

The Court does hereby identify as received in evidence and considered in the above entitled cause, Plaintiff's Exhibit 1, a map showing the switching zones within the City of Portland, Oregon, and Defendant's Exhibit I, a white print showing the district known as Guilds Lake, that said Exhibits were referred to and identified as a part of the

Bill of Exceptions settled and allowed in this cause.

IT IS FURTHER ORDERED that said Exhibits shall be retained in the custody of the Clerk of the United States District Court at Portland, Oregon, for use of the parties in the preparation of briefs in said cause, and shall be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at the time of argument.

IT IS FURTHER ORDERED that the printing of said exhibits may be omitted and that it shall not be necessary to print the same as a part of the record in said cause.

Done and dated this 8th day of February, 1935.

JOHN H. McNARY
District Judge.

Approved:
(Sd) OMAR C. SPENCER
Of Attorneys for Plaintiff

JAMES G. WILSON
Of Attorneys for Defendant

[Endorsed]: Filed February 8, 1935. [135]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 4 to 135 inclusive, constitute the transcript of record upon the appeal from the judgment of said

court, in a cause then pending therein in which the Spokane, Portland and Seattle Railway Company, a corporation, is plaintiff and appellee, and the Northern Pacific Terminal Company of Oregon, a corporation, is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and has been by me compared with the original thereof, and is a full, true and complete transcript of the record and proceedings had in said Court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $21.45, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 9th day of February, 1935.

[Seal] G. H. MARSH
Clerk [136]

[Endorsed] No. 7771. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Terminal Company of Oregon, a Corporation, Appellant, vs. Spokane, Portland and Seattle Railway Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed February 11, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.